Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

JIMMY ADAMS, *et al.*,

Petitioners,

v.

THE BRINK'S COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Circuit Court of Appeals affirmed the district court's decision that no fiduciaries, as that term is defined in the Employee Retirement Income Security Act ("ERISA"), of the Brink's Company Pension Plan ("Plan") made misrepresentations to Plaintiffs.[1] The key legal finding in the lower courts' decisions was that corporate officers and human resource employees were not fiduciaries when speaking to and answering questions of Plaintiffs regarding benefits under the Plan. The corporate officers and human resource employees were employed by The Pittston Company, which was the Plan's administrator, and subsidiaries of The Pittston Company. The Plaintiffs argued that these individuals misrepresented to Plaintiffs what years of service would be included in the calculation of pension benefits under the Plan.

The Fourth Circuit's decision is in direct conflict with this Court's holding in *Varity Corp. v. Howe*, 516 U.S. 489 (1996) and with holdings of the Second, Third, Fifth, Sixth, Seventh, Ninth and D.C. Circuits.[2]

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[1] The lower courts did find that misrepresentations were made by Plan's Administrative Committee to Plaintiffs Christopher Addington and Richards Hughes. Those representations are not the focus of this petition.

[2] *Adams v. The Brink's Co.*, Nos. 06-1744, 06-2770, 2008 WL 142771 (4th Cir. Jan. 11, 2008); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997); *Taylor v. Peoples Natural Gas*, 49 F.3d 982 (3d Cir. 1995); *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the United States*, 841 F.2d 658 (5th Cir. 1988); *Donovan v. Mercer*, (Cont'd)

Questions Presented:

1. When determining who is a fiduciary for purposes of ERISA, what actions make an employee of an entity named as the plan administrator, or a subsidiary of such entity, a fiduciary?

2. When determining who is a fiduciary for purposes of ERISA, do the doctrines of respondeat superior and/or apparent authority apply concerning actions taken by employees of an entity named as the plan administrator, or a subsidiary of such entity?

(Cont'd)

747 F.2d 304 (5th Cir. 1984); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002); *Krohn v. Huron Memorial Hosp.*, 173 F.3d 542 (6th Cir. 1999); *McGrath v. Lockheed Martin Corp.*, Nos. 00-6601, 00-6602, 2002 WL 31269646 (6th Cir. Oct. 9, 2002); *Bowerman v. Wal-Mart Stores*, 226 F.3d 574 (7th Cir. 2000); *Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541 (7th Cir. 1997); *Mathews v. Chevron*, 362 F.3d 1172 (9th Cir 2004); and *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747 (D.C. Cir. 1990).

LIST OF PARTIES

A list of all parties proceeding in the Court whose judgment is the subject of this petition is as follows:

Plaintiffs/Petitioners: Jimmy Adams, Christopher Brooks Addington, Oakley Michael Adkins, Jerry Baird, Jack Blanton, Michael A. Bledsoe, Robert Bledsoe, Kim Boggs, Michael E. Boggs, Harry Boone, Glenda Brady, William Breeding, John Browning, Jr., John Browning, Sr., Billy Bullion, Bennett L. Cantrell, Billy Cantrell, Floyd Cantrell, Freddie Cantrell, Isaac W. Cantrell, John W. Cantrell, Thelmer Cantrell, Donald Childress, Donald Clark, Greg Clark, Michael Clark, Randall A. Clark, James E. Cooke, Claude Cox, Vernus A. Culbertson, Teddy Dean, Carl T. Dotson, David Roger Elam, Willie M. Falin, Frank Farmer, Johnny Farmer, Hezekiah Franklin, David M. Freeman, Larry Gilliam, Roy R. Gilliam, Edward Graham, Donald L. Greear, Denver Hall, Dane Hamilton, Scotty Hamilton, Danny Hayes, Clegg Hess, Homer Hill, Thomas Hillman, Mike Hopkins, Richard Hughes, Jerry Hylton, Greg Ireson, Arthur Jenkins, J. Roger Jones, Roy Jones, Don Kennedy, David P. King, Charles Lane, Ronald Large, Alton Lawson, Ronnie L. Lawson, Tim Lawson, John Livingston, Robin Lovell, Woodrow Lovell, David G. McConnell, Russell Dwane McConnell, Henry McFadden, George L. Meade, Holly P. Meade, Ival Meade Jr., Kenneth R. Meade, Rick D. Meade, Terry Mitchell, Danny S. Moore, Roger D. Morgan, Donald E. Mullins, Donald M. Mullins, Franklin D. Mullins, Gary Mullins, Johnny R. Mullins, Ottis Mullins, Randy Mullins, Ronnie Mullins, Gerald Newton, Charles Osborne, Jeffrey Petro, Homer Phipps, Freddy Powers, Dennis Rasnick, Donald Ratliff, Bobby Redman,

Lawrence Reeves, Charles Richardson, Winston M. Richardson, Dusty Robinson, Jimmy W. Rose, Mitchell Salyers, Denver Sanders, Ricky Shelton, Ronald Slemp, Kenneth Sluss, Robert Smallwood, Donald Stair, Robert Stapleton, Jr., Jeff Summers, Willis Surrett, Jr., Gary Sweeney, Danny Taylor, Mrs. Ray Taylor, Administratrix, Judy Thacker, Phil Thacker, Willie Thacker, Jerry Tignor, Oscar Ray Watson, Bobby Wheeler, Clarence R. Whisenhunt, Jr., Mike Whitaker, Jerry W. White, Gary Williams, Arthur Wilson, Ralph Wilson, Jr., and Denver Winebarger, hereinafter collectively referred to as "Plaintiffs".

Defendants/Respondents: The Pittston Company, Paramont Coal Company, Inc., the Pension-Retirement Plan of The Pittston Company and Its Subsidiaries, and the Administrative Committee for the Pension-Retirement Plan of The Pittston Company and Its Subsidiaries, hereinafter collectively referred to as "Defendants."[3]

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[3] In 2003, while litigation was pending, The Pittston Company changed its name to The Brink's Company and the Pension-Retirement Plan of The Pittston Company and its Subsidiaries changed its name to The Brink's Company Pension Retirement Plan. Throughout this Petition, Plaintiffs will refer to the Defendant entities as they were named during the relevant time periods of the litigation. At all times during the period in dispute, The Pittston Company was the Plan's Administrator, as that term is defined in 29 U.S.C. 1002(16).

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PETITION FOR A WRIT OF CERTIORARI

Plaintiffs respectfully petition the Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit dated January 11, 2008.

OPINIONS BELOW

On January 11, 2008, the Fourth Circuit affirmed the opinion of the district court. *Adams v. The Brink's Co.*, Nos. 06-1744, 06-1770, 2008 WL 142771 (4th Cir. Jan. 11, 2008), reproduced in Appendix A. The Memorandum Opinion of the district court regarding the Second Motion for Summary Judgment was entered on March 17, 2006 (reported at 420 F. Supp. 2d 523 (W.D. Va. 2006)) and is attached as Appendix B. The Trial Memorandum Opinion and Order of the district court dated June 3, 2005, is attached as Appendix C.

STATEMENT OF JURISDICTION

The Plaintiffs assert federal question jurisdiction pursuant to the general jurisdictional grant of 28 U.S.C. § 1254(1) and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the judgment and opinion sought to be reviewed. This Court has jurisdiction to review the judgment of the Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1). The Defendants are (1) The Pittston Company, (2) Paramont Coal Company, Inc., (3) the Pension-Retirement Plan of The

Pittston Company and Its Subsidiaries and (4) the Administrative Committee for the Pension-Retirement Plan of The Pittston Company and Its Subsidiaries. Defendants are subject to the provisions of ERISA.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 29 U.S.C. § 1001 *et seq.*

STATEMENT OF THE CASE

On December 19, 2001 Plaintiffs filed suit in the Eastern District of Tennessee against (1) The Pittston Company, (2) Paramont Coal Company, Inc., (3) the Pension-Retirement Plan of The Pittston Company and Its Subsidiaries and (4) the Administrative Committee for the Pension-Retirement Plan of the Pittston Company and Its Subsidiaries alleging violations of ERISA, 29 U.S.C. § 1001, *et seq.* In their Complaint, the Plaintiffs asserted five causes of action: (1) wrongful denial of benefits under ERISA § 502(a)(1)(B) [29 U.S.C. § 1132(a)(1)(B)]; (2) breach of fiduciary duties under ERISA § 502(a)(3) [29 U.S.C. § 1132(a)(3)]; (3) estoppel; (4) creation of an informal plan; and (5) reduction of accrued benefits in violation of ERISA § 204(g) [29 U.S.C. § 1054(g)]. In response, the Defendants filed a motion to dismiss for failure to exhaust administrative remedies and improper venue, or, in the alternative, to transfer venue to the Western District of Virginia. The district court denied both motions to dismiss, but granted the Defendants' motion to transfer venue.

Pursuant to an Agreed Order giving Defendants an extension of time to respond, Defendants filed their Answer to the Complaint in the Western District of Virginia on April 4, 2002. On September 6, 2002, Defendants filed a motion for summary judgment, which the district court granted in part and denied in part. As a result of the district court's order, all of the Plaintiffs' claims were dismissed, with the exception of the claims for breach of fiduciary duty. By consent of the parties, the case was transferred to Magistrate Judge Pamela Meade Sargent pursuant to 28 U.S.C. § 636(c)(1) on August 20, 2004.

On October 7, 2004, an Agreed Order was entered severing the claims of five of the then 123 Plaintiffs to be tried to the district court first. The fiduciary claims of the five "Initial Plaintiffs" – Christopher Addington, Jack Blanton, Alton Lawson, Jr., Ricky D. Meade and Donald Ratliff – were tried to the district court February 22, 2005, through March 1, 2005. The district court entered its Findings of Fact and Conclusions of Law and Judgment on June 3, 2005, wherein it determined that Defendants had breached their fiduciary duty owed to Plaintiff Addington. The district court found no breach of fiduciary duty regarding the other four Initial Plaintiffs.

On October 25, 2005, Defendants filed a second motion for summary judgment, seeking entry of summary judgment on the breach of fiduciary claims of the remaining 118 Plaintiffs. The district court granted Defendants' motion by Memorandum Opinion and Order entered on March 17, 2006. By Agreed Order entered April 13, 2006 the district court consolidated

the case filed by Plaintiff Richard Hughes and set forth the parties' agreement as to the disposition of Plaintiff Hughes' claims.

A Final Judgment was entered on June 2, 2006, disposing of all claims before the district court with the exception of the parties' cross motions for attorney's fees. Judgment was granted in favor of Defendants as to all of Plaintiffs' claims except the breach of fiduciary claims of Plaintiffs Christopher Addington and Richard Hughes. The district court fashioned a remedy for Plaintiff Addington whereby it ordered Defendants to rescind Addington's election to take early retirement effective January 1, 1995, and to reinstate his pension benefit to the amount which he would have received had he elected to remain employed until his normal retirement date of November 1, 1997. The district court ordered Defendants to make payment to Plaintiff Richard Hughes in accordance with the Agreed Order entered in his case.

The Plaintiffs timely filed a Notice of Appeal with the district court on June 26, 2006 and an Amended Notice of Appeal dated July 7, 2006, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure. On July 6, 2006, Defendants cross-appealed the portions of the Final Judgment granting judgment in favor of Plaintiffs Christopher Addington and Richard Hughes as to their breach of fiduciary duty claims. On January 11, 2008, the Fourth Circuit affirmed the opinion of the district court.[4]

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[4] Because the Fourth Circuit found that there had been no breach or violation of fiduciary duty, the pending statute of (Cont'd)

REASONS FOR GRANTING THE PETITION

1. REVIEW IS WARRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARD FOR DETERMINING FIDUCIARY STATUS UNDER ERISA.

ERISA defines a fiduciary as follows:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

There is a conflict among the circuit courts of appeal as to the standard for determining fiduciary status

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(Cont'd)
limitations issue raised by the Defendants before the district court was moot and not addressed by the Fourth Circuit. Should this Court reverse and remand, the Plaintiffs are prepared to address the statute of limitations issue.

under ERISA.[5] The circuit courts have failed to find a consensus regarding what standard should apply and Plaintiffs ask this Court to grant certiorari to resolve this conflict and establish a uniform standard. The legislative history of ERISA suggests that the objective of ERISA's fiduciary-related provisions is "to establish uniform fiduciary standards" and "to provide effective remedies for breaches of trust." *See*, 120 Cong. Rec. 29,932 (1974) (remarks of Sen. Williams).

In 1996, this Court held in *Varity Corp. v. Howe*, 516 U.S. 489 (1996) that "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of power "appropriate" to carrying out an important plan purpose" and, therefore, make such a person making such communications a fiduciary. *Varity*, 516 at 490. "Reasonable employees . . . could have thought that Varity was communicating with them *both* in its capacity

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[5] *Adams v. The Brink's Co.*, Nos. 06-1744, 06-2770, 2008 WL 142771 (4th Cir. Jan. 11, 2008); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997); *Taylor v. Peoples Natural Gas*, 49 F.3d 982 (3d Cir. 1995); *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the United States*, 841 F.2d 658 (5th Cir. 1988); *Donovan v. Mercer*, 747 F.2d 304 (5th Cir. 1984); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002); *Krohn v. Huron Memorial Hosp.*, 173 F.3d 542 (6th Cir. 1999); *McGrath v. Lockheed Martin Corp.*, Nos. 00-6601, 00-6602, 2002 WL 31269646 (6th Cir. Oct. 9, 2002); *Bowerman v. Wal-Mart Stores*, 226 F.3d 574 (7th Cir. 2000); *Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541 (7th Cir. 1997); *Mathews v. Chevron*, 362 F.3d 1172 (9th Cir. 2004); and *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747 (D.C. Cir. 1990).

as employer *and* in its capacity as plan administrator" during a presentation made by a corporate officer. *Id.* at 503. In *Varity*, this Court held that the employer/plan administrator was acting as an ERISA "fiduciary" when it misled employees regarding their benefits. *Id.* *Varity* also held that the remedial provision of ERISA, 29 U.S.C. § 1132(a)(3), authorized individual relief. *Id.* at 507-515. The question since *Varity* has become who is a fiduciary under ERISA?[6]

The definition of a fiduciary is critical to both employers and employees as it relates to the enforcement provisions of ERISA. Employers need to know which employees are fiduciaries to ensure that such employees are aware of their fiduciary duties and so that the employer can properly train and monitor their actions. Employees need to understand which persons they can rely on and go to concerning employee benefit plan information. Making sure that accurate and truthful communication occurs between fiduciaries and participants in employee benefit plans is one of the fundamental principals of ERISA. 29 U.S.C. § 1001 *et seq.* The circuit courts have been inconsistent with the application of this definition, and guidance from this Court is needed to establish a uniform standard.

The question presented to this Court in *Varity* was whether in the factual circumstances present in that

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[6] The recent decision by this Court in *LaRue v. DeWolff, Boberg & Associates*, 128 S.Ct. 1020 (2008), which held that persons with individual account plans have a remedy to recover for fiduciary breaches under 29 U.S.C. § 1132(a)(2) further necessitates this Court's clarification of who is a fiduciary under ERISA and what actions constitute fiduciary conduct.

case was the employer acting as an ERISA fiduciary when it misled the plan participants. *Varity*, 516 U.S. at 492. This Court noted that in addition to the definition of a "fiduciary" found in 29 U.S.C. § 1002(21)(A), the fiduciary duties of ERISA "draw much of their content from the common law of trusts." *Varity*, 516 U.S. at 496. Therefore, in determining whether a party is a fiduciary under ERISA, a court must look not only at the statutory definition but also to the common law of trusts.

In *Varity*, as in this case, the employer was named as the plan administrator of the employee benefit plan. Recognizing that an employer can act as the employer or the plan administrator or both, the Supreme Court in *Varity* examined the factual circumstances to determine whether Varity "was exercising 'discretionary authority' respecting the plan's 'management' or 'administration'" when it made the misrepresentations. *Id.* at 498. Based on the facts determined by the lower court regarding the meeting of the employees, this Court agreed with the lower court that Varity spoke in its capacity as plan administrator at the meeting. *Id.* at 501. To reach this conclusion, this Court examined whether the actions of the individuals fell within the statutory definition of "fiduciary" acts under ERISA. This determination requires interpretation of "the statutory terms which limit the scope of fiduciary activity to discretionary acts of plan 'management' and 'administration.'" *Id.* at 502.

This Court found these terms to not be self-defining and the activity at issue did not fall clearly within the common understanding of the terms. Therefore, this Court looked to common law of trusts for guidance and

focused on the term "administration" and found this duty to include the performance of duties imposed or the exercise of powers conferred by the trust documents. *Id.* at 502. Furthermore, the common law of trusts recognizes that a trust document implicitly confers such powers that are necessary or appropriate to carry out the purposes of the trust. *Id.* This Court found that "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation would seem to be an exercise of power 'appropriate' to carrying out an important plan purpose." *Id.*

This Court also recognized the common law doctrine of apparent authority and its part in applying the definition of "fiduciary" under ERISA.

> Finally, reasonable employees, in the circumstances found by the District Court, could have thought that Varity was communicating with them *both* in its capacity as employer *and* in its capacity as plan administrator. Reasonable employees might not have distinguished consciously between the two roles. But they would have known that the employer was their plan's administrator and had expert knowledge about how their plan worked. The central conclusion ("your benefits are secure") could well have drawn strength from their awareness of that

> expertise, and one could reasonably believe that the employer, aware of the importance of the matter, so intended.

Varity, 516 U.S. at 503.

In its opinion, the Fourth Circuit cites the definition of fiduciary found in 29 U.S.C. § 1002(21)(A). However, in its discussion of the application of this definition to the facts of this case, the Fourth Circuit, while citing to this Court's decision in *Varity*, failed to follow the legal analysis used by this Court in *Varity* in determining fiduciary status under ERISA. The Fourth Circuit based its decision that the individuals who made representations to the Plaintiffs were not fiduciaries on its summary conclusion that they did not possess discretionary authority to alter the terms of the Pittston Plan or to determine eligibility for benefits.[7] *Adams*,

[7] This conclusion by the Fourth Circuit is in direct contradiction with its conclusion that the Plaintiffs were put on notice that they would not receive credit for their Paramont years of service through the November 10, 1988 letter from Randy Robinette and a December 1988 article in the Paramont Pride. *Adams*, 2008 WL 142771 at *2. The Fourth Circuit later stated in its opinion that Robinette was not a fiduciary because he had "no discretionary authority to alter the terms of the Pittston Plan or to determine eligibility for benefit or the amount of benefits a participant was entitled to under the Pittston Plan." *Adams*, 2008 WL 142771 at *5. How were Plaintiffs to discern that they should rely on a letter (from a person the Fourth Circuit held was not a fiduciary) and a company news article but ignore the Paramont President, Michael Quillen, and his boss, Gerald Spindler. It is hard to reconcile the court's argument that company officials standing before a group of employees discussing benefits were not acting as fiduciaries because they lacked the authority to do so, but an article in a company newspaper possessed such authority.

2008 WL 142771 at *5. This standard goes beyond the definition of fiduciary in ERISA, 29 U.S.C. § 1002(21)(A) as applied by this Court in *Varity*. The Fourth Circuit failed to address the doctrine of apparent authority in its analysis, despite the similarities between the factual circumstances of *Varity* and the case at issue. In both cases, members of upper management stood before a group of employees and made representations regarding benefits. In the case at hand, like in *Varity*, it was reasonable for the employees at the meeting held at Clinch Valley College in 1990 to believe those speaking possessed the knowledge and expertise to speak to them regarding their benefits. This was completely ignored by the Fourth Circuit.

The Defendants, through their corporate officers and human resource employees, communicated with Plaintiffs and misled them regarding which years of service would be included in the calculation of pension benefits. It is Plaintiffs' position that they were told on many occasions by many persons that their years of service with Paramont Coal Company[8] would be included in the calculation of pension benefits under the Plan. The district court held and the Fourth Circuit affirmed that these corporate officers and human resource employees did not meet the definition of a fiduciary as provided in ERISA.

The day-to-day administration of the Plan had been delegated to the local human resources offices of all the Defendants' locations pursuant to the terms of the

[8] Paramont Coal Company was purchased by Pittston in 1986. Plaintiffs are former employees of Paramont Coal Company.

summary plan description, which directed participants to local human resource managers for questions about the Plan. Furthermore, Michael Quillen, the president of Paramont, testified that he informed employees of Paramont that their years of service would be included in the calculation of pension benefits under the Pittston Plan after Pittston had acquired Paramont in 1986.

Jack Blanton, one of the initial Plaintiffs whose claims were tried, testified at trial that Gerald Spindler, the vice president of Pittston and president of Pyxis,[9] informed all employees of Paramont at a mandatory meeting in 1990 at Clinch Valley College that Paramont years of service would be included in the calculation of pension benefits under the Pittston Plan. Furthermore, Blanton testified at trial that part of the presentation made to employees at this mandatory meeting discussed health benefits and explained the merger of the Paramont pension plans into the Pittston Plan.[10] Plaintiff Rick Meade received a memo from Eddie Neely, an employee of Pyxis, that stated, "[p]lease use this memo as your authority to record the benefit and vesting service date of the above referenced individual as

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[9] Pyxis was the nonunion company formed by Pittston to purchase Paramont Coal Company.

[10] This testimony contradicts the findings of fact of the Fourth Circuit. The Fourth Circuit held that the only discussion of benefits during the mandatory meeting was during a question and answer session at the end of the presentation. Jack Blanton's uncontradicted testimony at trial was that health and pension benefits were discussed both during the main presentation and during the question and answer session.

October 28, 1981."[11] *See*, Fourth Circuit Joint Appendix, Page 1355. Plaintiffs Christopher Addington and Richard Hughes were some of the first retirees from Paramont under the Pittston Plan and actually received pension payments based on the inclusion of credit for their years of service with Paramont in the calculation of pension benefits under the Pittston Plan, as represented. Christopher Addington retired in 1995. After Christopher Addington had received his pension for five years, Pittston notified Addington that he was receiving an incorrect pension and lowered his pension substantially. Later, the Defendants did the same thing to Richard Hughes.

In 1997, Michael Quillen, the former president of Paramont, again confirmed in writing to Pittston what he had represented to the Paramont employees regarding the inclusion of Paramont years of service in the Plan. Because Quillen knew what had been communicated to the Plaintiffs he recognized the potential legal issues and stated that he did not want to be part of a lawsuit over this issue. Finally, in 2000, Pittston sent a letter to all Paramont employees informing them that there had been some confusion over terms "vesting service" and "benefit service." According to Pittston, the Paramont employees were to receive "vesting" credit for the years of service with Paramont, but not "benefit" service for these same years of service. This is not what the Plaintiffs heard the Defendants say.

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[11] This date is significant because this was Meade's date of employment with Paramont. Pittston did not purchase Paramont until 1986.

The Fourth Circuit's ruling in this matter is in conflict with the decisions of other circuit courts regarding the standard for determining fiduciary status under ERISA. Furthermore, eight circuit courts have ruled on this issue and a number of the holdings are in at least partial conflict with the Fourth Circuit's definition of fiduciary.[12] This Court should grant certiorari to resolve the conflict among the circuits on the standard for determining fiduciary status under ERISA.

In *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997), plaintiffs alleged that defendant, Kodak, falsely assured them that no further changes were going to be made to the retirement plan. The plaintiffs were considering accepting an early retirement incentive plan. The Second Circuit never defined who was speaking as a fiduciary and instead said the employer was speaking and that was enough for a breach of fiduciary case. *Id.* at 124. The Second Circuit relied on *Varity.*

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[12] *Adams v. The Brink's Co.*, Nos. 06-1744, 06-2770, 2008 WL 142771 (4th Cir. Jan. 11, 2008); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997); *Taylor v. Peoples Natural Gas*, 49 F.3d 982 (3d Cir. 1995); *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the United States*, 841 F.2d 658 (5th Cir. 1988); *Donovan v. Mercer*, 747 F.2d 304 (5th Cir. 1984); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002); *Krohn v. Huron Memorial Hosp.*, 173 F. 3d 542 (6th Cir. 1999); *McGrath v. Lockheed Martin Corp.*, Nos. 00-6601, 00-6602, 2002 WL 31269646 (6th Cir. Oct. 9, 2002); *Bowerman v. Wal-Mart Stores*, 226 F.3d 574 (7th Cir. 2000); *Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541 (7th Cir. 1997); *Mathews v. Chevron*, 362 F.3d 1172 (9th Cir 2004); and *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747 (D.C. Cir. 1990).

In *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982 (3d Cir. 1995), the Third Circuit held that a supervisor of employee benefits had at least apparent authority to speak for a fiduciary when he counseled a retiree about possible amendments to the plan. *Id.* The supervisor of employee benefits, who was not a member of the ERISA plan administrator, was acting to assist the plan administrator, not the employer, in discharging its fiduciary obligation to control the operation and administration of the plan when the supervisor advised a retiree regarding rights and obligations under the plan. *Id.* at 984, *citing* ERISA § 402(a)(1); 29 U.S.C.A. § 1102(a)(1); and 29 C.F.R. § 2509.75-8.

In *Donovan v. Mercer*, 747 F.2d 304 (5th Cir. 1984), the Fifth Circuit held that Congress intended that the definition of fiduciary under ERISA to be broadly construed and that the definition of fiduciary includes person who have the ability and responsibility with respect to a matter in question. *Id.* at 309, *citing* 29 U.S.C. § 1002(21). The Fifth Circuit also stated that term fiduciary includes those to whom some discretionary authority has been delegated. *Id.* The Fifth Circuit has also held that the doctrine of respondeat superior may apply in breach of fiduciary cases. *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the United States*, 841 F.2d 658 (5th Cir. 1988), *see Stanton v. Shearson Lehman/American Express, Inc.*, 631 F. Supp. 100 (N.D.Ga. 1986). In *American Federation*, the Fifth Circuit stated that a fiduciary for purposes of ERISA is liberally construed in keeping with the remedial purpose of the Act. *American Federation*, 841 F.2d at 662.

In *Krohn v. Huron Memorial Hosp.*, 173 F.3d 542 (6th Cir. 1999), the Sixth Circuit held that a personnel assistant's response to an inquiry by an ERISA plan participant's husband was materially misleading and thus constituted a breach of fiduciary duty. *Id.* at 548. An administrative assistant would have not met the strict definition of a fiduciary under ERISA but the court held that her actions constituted a breach of duty.

In *McGrath v. Lockheed Martin Corp.*, Nos. 00-6601, 00-6602, 2002 WL 31269646 (6th Cir. Oct. 9, 2002), the Sixth Circuit held that fiduciary duty provisions of ERISA incorporate the common law of trusts and that the duty to inform is a constant thread in the relationship between the beneficiary and the trustee. The fiduciary misrepresentation in *McGrath* was made by a low level administrative employee.

The Sixth Circuit, in *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002), held that an ERISA fiduciary's misrepresentation is material if there is substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision in pursuing benefits to which he or she may be entitled. The fiduciary has the duty to inform. *Id.* at 449. The fiduciary misrepresentations were made by a plant manager and human resources liaison in this case. The Sixth Circuit considered the representations to have been made by the employer. *Id.* at 455.

In *Bowerman v. Wal-Mart Stores*, 226 F.3d 574 (7th Cir. 2000), the court held that administrative assistants can be considered fiduciaries under ERISA's "functional" definition of a fiduciary. The court concluded

that a department administrative assistant had "apparent authority" to speak on plan benefits. *Id.* at 584. The Seventh Circuit also relied on the concept of apparent authority as stated in *Taylor v. Peoples Natural Gas*, 49 F.3d 982, 987-89 (3rd Cir. 1995). The court concluded that apparent authority arises "in those situations where the principal causes persons with whom the agent deals to reasonably believe that the agent has the authority." *Id.* The Seventh Circuit also held that trustees may breach their fiduciary duties by failing to exercise care in training non-fiduciaries responsible for responding to participant inquiries. *Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541, 548 (7th Cir. 1997), *citing* 29 U.S.C.A. § 1001 *et seq.* If written materials are inadequate, ERISA fiduciaries must be held responsible for failure to provide complete and correct material information in the event that a non-fiduciary agent provides misleading information. *Id.*

The Ninth Circuit held, in *Mathews v. Chevron*, 362 F.3d 1172 (9th Cir. 2004), that an employer and general manager were properly held liable for the reasonably foreseeable consequences of their misinformation. A member of local management responded to employee questions posted to a company web-site regarding the availability of severance packages. *Id.* at 1177. The court held that the representations were made by those with "plan related authority." *Id.* at 1180. "Our holding, therefore, is identical to that of *Varity*: 'the factual context in which the statements were made, combined with the plan-related nature of the activity, engaged in by those who had plan-related authority to do so, together provide sufficient support for the District Court's legal conclusion that [Chevron] was acting as a

fiduciary.' " *Id.* at 1179. "In doing so, we need not reach Chevron's contention, on which we express no opinion, that Congress carefully confined ERISA remedies for mere employment communications to *29 U.S.C. § 1104.*" *Id.*

The District of Columbia Circuit held that the duties of an ERISA fiduciary are not limited by ERISA's express provisions but instead include duties derived from common law trust principles. *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 750 (D.C. Cir. 1990), *citing Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559 (1985). "Rather than explicitly enumerate all the . . . duties [of ERISA fiduciaries], Congress invoked the common law of trusts to define the general scope of their . . . responsibility." *Id.* The Court held that Eddy should not be penalized because "he failed to comprehend the technical difference between "conversion" and "continuation". *Id.* at 751. "The same ignorance that precipitates the need for answers often limits the ability to ask precisely the right questions." *Id.*

There is a need for this Court to clarify the definition of a fiduciary for the purposes of ERISA. Since the definition is functional, as stated in *Varity*, what are the required functions? Is apparent authority the controlling factor in defining a fiduciary? Who has authority to speak on behalf of an employer if the employer is named as the administrator, as defined in 29 U.S.C. § 1002(16)?

CONCLUSION

One of the principle purposes of ERISA is to protect the interests of participants and beneficiaries by establishing standards of conduct, responsibility, and obligations for fiduciaries and providing for appropriate remedies. *Jones v. American Gen. Life and Accident Ins. Co.*, 370 F.3d 1065, 1071 (11th Cir. 2004), *citing Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996) (*quoting* 29 U.S.C. § 1001(b). "In furtherance of this general objective, ERISA section 404(a) obligates fiduciaries to discharge their duties solely in the interest of the participants and beneficiaries." *Jones*, 370 F.3d at 1071 (*citing* 29 U.S.C. § 1104(a) (internal quotes omitted)). This fiduciary status is "the highest known to law." *Id.*

A "person is a fiduciary with respect to a plan," and therefore subject to ERISA fiduciary duties, "to the extent" that he or she "exercises any discretionary authority or discretionary control respecting management" of the plan, or "has any discretionary authority or discretionary responsibility in the administration" of the plan. ERISA § 3(21)(A). This Court recognized this as the starting point of determining fiduciary liability and determined that when an employer, who is designated as the plan administrator by the terms of the plan document, speaks to employees regarding benefits, it is performing a fiduciary function. The holding in *Varity* did not simply rest on the language of the ERISA statute. Instead, this Court proceeded to attempt to define what actions may fall within the limited statutory definition of "fiduciary" acts of plan "management" and "administration." 29 U.S.C. § 1002(21)(A). As the Court

recognized, "these words are not self-defining, and the activity at issue here [communicating to employees regarding benefits] neither falls clearly within nor outside of the common understanding of these words." *Varity*, 516 U.S. at 502.

This Court concluded that when Varity made its misrepresentations it was exercising "discretionary authority" respecting the plan's "management" or "administration," within the meaning of ERISA, 29 U.S.C. § 1002(21)(A). Looking to the common law of trusts, this Court held that a trust document implicitly confers "such powers as are necessary or appropriate for the carrying out of the purposes" of the trust and reasoned that conveying information about the likelihood of future plan benefits to employees was a power "appropriate for carrying out the purposes" of the trust.

The Fourth Circuit's holding in this case is inimical to *Varity*. In *Varity*, this Court considered the circumstances surrounding the misrepresentations and determined that, under the facts presented, the employer was acting as a plan administrator at the time it made certain misrepresentations about the plan. The facts of this case are eerily similar to those in *Varity*. However, the district court and the Fourth Circuit failed to even consider those facts. They merely looked at the language in ERISA, 29 U.S.C. § 1002(21)(A) and determined that none of the Pittston employees who spoke regarding benefits were fiduciaries because they had no "discretionary authority or discretionary control" over plan assets or administration. As *Varity* held, and as recognized by the majority of other circuits,

determination of fiduciary status is a functional test and must be considered within the context of the actual representations made to employees.

Pittston was acting as plan administrator when it, through its officers and human resource staff, misrepresented to Plaintiffs that their pension benefits would include years worked at Paramont. Pittston perpetuated this confusion and misinformation for years. There were several memoranda and meetings concerning plan benefits throughout the years delivered by several employees of Defendants. This only added to the confusion about what benefits to which the Plaintiffs were entitled. Pittston could have designated and authorized only certain individuals to speak as plan administrator in accordance with ERISA, 29 U.S.C. § 1102(b)(2). By failing to do so, it was reasonable for the Plaintiffs to seek out answers regarding their benefits from their local human resource managers. In fact, this is what the summary plan description directed them to do. It was also reasonable for them to rely upon statements and assurances made to them by the officers and management of the Defendants that all of the years they had spent working at Paramont Coal Company would be considered in calculating their pension benefits under the Plan.

For the foregoing reasons, Plaintiffs respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED JANUARY 11, 2008

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-1744

JIMMY ADAMS; CHRISTOPHER BROOKS ADDINGTON; MICHAEL ADKINS; JERRY BAIRD; MICHAEL A. BLEDSOE; ROBERT BLEDSOE; KIM BOGGS; HARRY BOONE; GLENDA BRADY; WILLIAM BREEDING; JOHN BROWNING, JR.; JOHN BROWNING, SR.; BILLY BULLION; BENNETT S. CANTRELL; BILLY CANTRELL; FLOYD CANTRELL; FREDDIE CANTRELL; ISAAC W. CANTRELL; JOHN W. CANTRELL; THELMER CANTRELL; DONALD CHILDRESS; DONALD R. CLARK; GREG CLARK; MICHAEL CLARK; RANDALL A. CLARK; JAMES E. COOKE; CLAUDE COX; VERNUS A. CULBERTSON; TEDDY DEAN; CARL T. DOTSON; DAVID ELAM; WILLIE M. FALIN; FRANK FARMER; JOHNNY W. FARMER; HEZEKIAH FRANKLIN; DAVID M. FREEMAN; LARRY GILLIAM; ROY R. GILLIAM; EDWARD GRAHAM; DONALD GREEAR; DENVER HALL; DANE HAMILTON; SCOTTY HAMILTON; DANNY HAYES; CLEGG HESS; HOMER HILL; THOMAS HILLMAN; RICHARD HUGHES; JERRY HYLTON; GREG IRESON; ARTHUR W. JENKINS; ROGER J. JONES; ROY JONES; DON KENNEDY; DAVID KING; CHARLES LANE; RONALD LARGE;

ATLON LAWSON; RONNIE L. LAWSON; TIM LAWSON; JOHN LIVINGSTON; ROBIN LOVELL; WOODROW LOVELL; DAVID G. MCCONNELL; DWAYNE MCCONNELL; HENRY MCFADDEN; GEORGE L. MEADE; HOLLY P. MEADE; IVAL MEADE; RICKY MEADE; DANNY S. MOORE; ROGER D. MORGAN; DONALD E. MULLINS; DONALD M. MULLINS; FRANKLIN D. MULLINS; GARY MULLINS; JOHNNY R. MULLINS; OTTIS MULLINS; RANDY MULLINS; RONNIE MULLINS; GERALD NEWTON; CHARLES OSBORNE; JEFFREY PETRO; HOMER PHIPPS; FREDDY POWERS; DENNIS RASNIC; BOBBY REDMAN; LAWRENCE REEVES; CHARLES RICHARDSON, JR.; DUSTY ROBINSON; JIMMY ROSE; MITCHELL SALYERS; DENVER SANDERS; RICKY SHELTON; RONNIE SLEMP; KENNETH SLUSS; DONALD STAIR; ROBERT STAPLETON; JEFF SUMMERS; WILLIS SURRETT, JR.; GARY SWINEY; DANNY TAYLOR; JUDY THACKER; PHIL THACKER; WILLIE THACKER; JERRY TIGNOR; RAY WATSON; BOBBY WHEELER; CLARENCE WHISENHUNT; MIKE WHITAKER; JERRY WHITE; GARY WILLIAMS; ARTHUR WILSON; RALPH WILSON, JR.; DENVER WINEBARGER; ROBERT SMALLWOOD; WINSTON RICHARDSON; MICHAEL HOPKINS; KENNETH MEADE; TERRY MITCHELL; MICHAEL BOGGS; RAY TAYLOR; JACK BLANTON; DONALD RATLIFF,

Plaintiffs-Appellants,

Appendix A

and

MARTIN JESSEE; JAMES W. RAY; SAM ADKINS; DENNIS A. CANTRELL; JEFF FRANKLIN; TRENTON MULLINS; DAVID MCCARTY,

Plaintiffs,

versus

THE BRINK'S COMPANY; PARAMONT COAL CORPORATION; THE BRINK'S COMPANY PENSION-RETIREMENT PLAN; ADMINISTRATIVE COMMITTEE FOR THE BRINK'S COMPANY PENSION-RETIREMENT PLAN,

Defendants - Appellees.

No. 06-1770

JIMMY ADAMS; CHRISTOPHER BROOKS ADDINGTON; MICHAEL ADKINS; JERRY BAIRD; MICHAEL A. BLEDSOE; ROBERT BLEDSOE; KIM BOGGS; HARRY BOONE; GLENDA BRADY; WILLIAM BREEDING; JOHN BROWNING, JR.; JOHN BROWNING, SR.; BILLY BULLION; BENNETT S. CANTRELL; BILLY CANTRELL; FLOYD CANTRELL; FREDDIE CANTRELL; ISAAC W. CANTRELL; JOHN W. CANTRELL;

THELMER CANTRELL; DONALD CHILDRESS; DONALD R. CLARK; GREG CLARK; MICHAEL CLARK; RANDALL A. CLARK; JAMES E. COOKE; CLAUDE COX; VERNUS A. CULBERTSON; TEDDY DEAN; CARL T. DOTSON; DAVID ELAM; WILLIE M. FALIN; FRANK FARMER; JOHNNY W. FARMER; HEZEKIAH FRANKLIN; DAVID M. FREEMAN; LARRY GILLIAM; ROY R. GILLIAM; EDWARD GRAHAM; DONALD GREEAR; DENVER HALL; DANE HAMILTON; SCOTTY HAMILTON; DANNY HAYES; CLEGG HESS; HOMER HILL; THOMAS HILLMAN; RICHARD HUGHES; JERRY HYLTON; GREG IRESON; ARTHUR W. JENKINS; ROGER J. JONES; ROY JONES; DON KENNEDY; DAVID KING; CHARLES LANE; RONALD LARGE; ATLON LAWSON; RONNIE L. LAWSON; TIM LAWSON; JOHN LIVINGSTON; ROBIN LOVELL; WOODROW LOVELL; DAVID G. MCCONNELL; DWAYNE MCCONNELL; HENRY MCFADDEN; GEORGE L. MEADE; HOLLY P. MEADE; IVAL MEADE; RICKY MEADE; DANNY S. MOORE; ROGER D. MORGAN; DONALD E. MULLINS; DONALD M. MULLINS; FRANKLIN D. MULLINS; GARY MULLINS; JOHNNY R. MULLINS; OTTIS MULLINS; RANDY MULLINS; RONNIE MULLINS; GERALD NEWTON; CHARLES OSBORNE; JEFFREY PETRO; HOMER PHIPPS; FREDDY POWERS; DENNIS RASNIC; BOBBY REDMAN; LAWRENCE REEVES; CHARLES RICHARDSON, JR.; DUSTY ROBINSON; JIMMY ROSE; MITCHELL SALYERS; DENVER SANDERS; RICKY SHELTON; RONNIE SLEMP; KENNETH

SLUSS; DONALD STAIR; ROBERT STAPLETON; JEFF SUMMERS; WILLIS SURRETT, JR.; GARY SWINEY; DANNY TAYLOR; JUDY THACKER; PHIL THACKER; WILLIE THACKER; JERRY TIGNOR; RAY WATSON; BOBBY WHEELER; CLARENCE WHISENHUNT; MIKE WHITAKER; JERRY WHITE; GARY WILLIAMS; ARTHUR WILSON; RALPH WILSON, JR.; DENVER WINEBARGER; ROBERT SMALLWOOD; WINSTON RICHARDSON; MICHAEL HOPKINS; KENNETH MEADE; TERRY MITCHELL; MICHAEL BOGGS; RAY TAYLOR; JACK BLANTON; DONALD RATLIFF,

Plaintiffs-Appellees,

and

MARTIN JESSEE; JAMES W. RAY; SAM ADKINS; DENNIS A. CANTRELL; JEFF FRANKLIN; TRENTON MULLINS; DAVID MCCARTY,

Plaintiffs,

v.

THE BRINK'S COMPANY; PARAMONT COAL CORPORATION; THE BRINK'S COMPANY PENSION-RETIREMENT PLAN; ADMINISTRATIVE COMMITTEE FOR THE BRINK'S COMPANY PENSION-RETIREMENT PLAN,

Defendants-Appellants.

Appendix A

Appeals from the United States District Court for the Western District of Virginia, at Big Stone Gap. Pamela Meade Sargent, Magistrate Judge. (2:02-cv-00044-PMS)

Argued: September 27, 2007
Decided: January 11, 2008

Before WILLIAMS, Chief Judge, DUNCAN, Circuit Judge, and RAYMOND A. JACKSON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Judge JACKSON wrote the opinion, in which Chief Judge WILLIAMS and JUDGE Duncan joined.

JACKSON, District Judge:

Appellants petition for review of the final order of the district court which disposed of most of Appellants' claims, denying additional pension benefits under the Pittston Plan. Appellees cross-appeal the district court judgment with respect to Christopher Brooks Addington, who succeeded on his breach of fiduciary duty claim. For the reasons that follow, we affirm.

I.

Appellants are former employees of Paramont Coal Corporation and current and/or former employees of the Pittston Company, a subsidiary of the Brink's Company.

J.A. 101. In this action, Appellants seek benefit accrual service credit under the Pittston Plan for service with Paramont before Paramont's pension plans were merged into the Pittston Plan. (Appellees' Br., 4.)

In July 1986, Pyxis Resources, then a subsidiary of The Pittston Company ("Pittston"), acquired Paramont Coal Company ("Paramont"). JA 2962. In 2003, Pittston changed its name to the Brink's Company and the Pension-Retirement Plan of the Pittston Company and Its Subsidiaries changed its name to the Brink's Company Pension-Retirement Plan. JA 1798.

At the time of Paramont's acquisition by Pyxis, Paramont employees were participants in one of two identical defined-benefit pension plans: (1) the Salaried Employees' Pension Plan of Paramont Coal Corporation or (2) the Hourly Employees' Pension Plan of Paramont Coal Corporation (collectively hereinafter referred to as the "Paramont Plans"). JA 1394, 1398. The Paramont Plans provided a maximum monthly retirement benefit of $350 for 20 years of service with Paramont. JA 2962-2963. All Paramont employees, regardless of their salary, earned the same retirement benefit for the same years of service. JA 2963.

The Paramont Plans remained in effect until January 1, 1989, when the Paramont Plans merged into the Pittston Plan. JA 2963. The Pittston Plan established a more generous benefit formula than the Paramont Plans. The Pittston Plan calculated benefits by multiplying a percentage of an average salary by the number of years

of "Benefit Accrual Service." JA 176, 2964-65. Moreover, the Pittston Plan imposed no cap on these benefits. JA 176, 2964-65.

Exhibit G to the Pittston Plan, entitled "Special Provisions Applicable to Former Participants in the Pension Plans of Paramont Coal Corporation," states that the Paramont Plans shall be merged into the Pittston Plan and that "in connection with such mergers, the provisions of this Exhibit G shall apply, effective January 1, 1989, notwithstanding any provisions elsewhere in the Plan to the contrary."[1] JA 315, 2963.

Exhibit G further provides that vesting service under the Paramont Plans would count as vesting service under the Pittston Plan. JA 315. The district court found the language of Exhibit G to be clear and unambiguous and concluded that it does not provide for the inclusion of Appellants' years of service with Paramont prior to January 1, 1989, in the calculation of their retirement benefits under the Pittston Plan. JA 2964. There is no dispute that Appellants are receiving or are entitled to receive these retirement benefits as calculated.

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1. Exhibit G states in part: "The accrued pension benefit of each Paramont Participant under the Plan in respect of periods of service prior to January 1, 1989, shall be determined solely in accordance with the provisions of the Paramont Plan in which he was a participant, as in effect immediately prior to January 1, 1989, based solely on his 'Benefit Service' (as defined in such Paramont Plan) on December 31, 1988 or any earlier date on which the Paramont Participant ceases to be an employee of Paramont Coal Corporation . . ." JA 277-278,315.

Appendix A

Appellants argue that Pittston intentionally deceived them by saying, on numerous occasions beginning with Paramont's acquisition by Pyxis, that Paramont employees would receive benefit accrual service credit for their years of service with Paramont prior to January 1, 1989. (Appellants Br., 35.) However, based on the evidence presented at trial, the district court found that Pittston had not made misrepresentations.[2] JA 3049.

Two years after the acquisition of Paramont, all Paramont employees received a 1988 Employee Handbook that accurately stated that each was covered for pension benefits by only the Paramont Plans. JA 1296, 1308-20, 3047. Prior to the merger of the plans, every Paramont employee received two notices that they would not receive credit under the more lucrative Pittston Plan formula for their years of service with Paramont prior to January 1, 1989. JA 3047. These notices came in a November 10, 1988 letter from Randy Robinette, and a December 1988 article in the Paramont Pride, the company newspaper. JA 1334-34.1, 1350, 3047.

More than a year after Paramont employees received these accurate descriptions in 1988, Gerald Spindler, a Pittston Vice President who performed no routine

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2. The district court concluded that the evidence does not in any way establish any concerted corporate wide effort to deceive current and former Paramont employees and that Michael Quillen, Kathy Fox, and Gerald Spindler did not tell plaintiffs that their years of service with Paramont prior to January 1, 1989 would be included in the calculation of their benefits under the Pittston Plan. JA 3049.

functions with regard to the Pittston Plan, spoke at a meeting held at Clinch Valley College in 1990. JA 739, 769, 3009, 3065. The purpose of the meeting was to explain to the union-free side of Pittston's operation, which included more than just Paramont employees, how they could be affected by the new union contract. JA 739. A contract that settled a Pittston-UMWA coal strike had been settled the day before the commencement of the meeting. For the first time in the history of Paramont, the union-free work force was affected by the language of the contract. JA 739. At the meeting, Gerald Spindler, Scott Perkins, and Donnie Ratliff discussed the value of the Pittston/Paramont marriage, the management structure and growth potential. JA 740. Spindler spoke about contracts, the commitment to remain union-free, and the importance of the Pyxis group. JA 740. Spindler also answered questions on a variety of subjects, one of them concerning the Pittston pension funds and Paramont years counting in the benefit calculation. JA 741. Although the purpose of the meeting did not specifically include discussing pension benefits, Spindler made his planned remarks, and when an employee subsequently inquired about their time of pension service, Spindler answered, "nothing will change." JA 741, 872, 3018. Spindler did not explain or elaborate and the district court found that Spindler made no misrepresentations. JA 872, 3018.

Additional accurate communications were distributed to all Paramont employees after the Clinch Valley College meeting. JA 1340, 3047-3048. Also, numerous witnesses at trial testified that they

understood the relevant terms of the Pittston Plan. JA 3048.

However, over the years, a minority of employees received annual benefit statements that occasionally incorrectly estimated the amount of their projected pension benefits by including too many years of benefit accrual service under the Pittston calculation formula. JA 3049. Of the 836 annual benefit statements sent to Plaintiffs, 8% incorrectly estimated future retirement benefits. JA 2951, 3049. The annual benefit statements did not indicate how the estimate had been calculated and did not state that the employee's years of service with Paramont prior to January 1, 1989 were included in the calculation of their benefits under the Pittston Plan formula. JA 3057. Also, the annual benefit statements cautioned that the figures were estimates. JA 3057.

Appellants instituted this action on December 19, 2001, in the United States District court for the Eastern District of Tennessee seeking legal, declaratory and equitable relief for various claims against (1) Pittston, (2) Paramont, (3) the Pittston Plan, and (4) the Administrative Committee for the Pittston Plan ("Administrative Committee"). JA 99-107. Appellants asserted federal question jurisdiction in the district court pursuant to the general jurisdictional grant of 28 U.S.C. § 1331 and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* JA 102.

On September 6, 2002, Pittston filed a Motion for Summary Judgment, which the district court granted

in part and denied in part by Memorandum Opinion and Order entered November 18, 2003. JA 497-504. On October 7, 2004, an Agreed Order was entered severing the claims of five of the then 123 plaintiffs to be tried to the court first. JA 505-507. The court entered its Findings of Fact and Conclusions of Law and Judgment in the trial of these five plaintiffs ("Initial Plaintiffs") on June 3, 2005. JA 2960-3079. On October 24, 2005, Pittston filed a Second Motion for Summary Judgment, seeking entry of summary judgment on the claims of the remaining 119 plaintiffs. The district court granted Pittston's Second Motion for Summary Judgment by Memorandum Opinion and Order entered on March 17, 2006. JA 4667-4730. A Final Judgment was entered on June 2, 2006, disposing of all claims before the district court with the exception of the parties' cross motions for attorney's fees. JA 4737-4740.

Appellants are appealing the final order of the district court entered on June 2, 2006. Appellants timely filed a Notice of Appeal with the district court on June 26, 2006, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure. JA 4741-4750. Appellants filed an amended Notice of Appeal on July 7, 2006. JA 4753-4758. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II.

On appeal, Appellants argue that the district court erred and challenge its judgment on four grounds. On cross-appeal, Appellees challenge the district courts

judgment with respect to Christopher Brooks Addington. We address each argument in turn below.

A.

Appellants first assert that certain Pittston employees were fiduciaries of the Pittston Plan in accordance with the Supreme Court's decision in *Varity Corporation v. Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). Specifically, Appellants aver that Gerald Spindler, President of Pittston, acted as a fiduciary of the Pittston Plan when he spoke to a group of employees at a company-wide meeting regarding Plan benefits. Appellants also assert that Michael Quillen was delegated fiduciary responsibilities by the Administrative Committee and had apparent authority to speak on behalf of the Plan. In addition, Appellants assert that Donald Ratliff, Kathy Fox, Rhonda Miller and Eddie Needy were fiduciaries of the Pittston Plan. The Court disagrees.

The United States Supreme Court has recognized the rights of an individual participant to sue a person acting as a fiduciary under an ERISA plan for breach of fiduciary duty, and to seek relief pursuant to 29 U.S.C. § 1132(a)(3). *Varity Corp.*, 516 U.S. at 489. In order to establish a claim for breach of fiduciary duty based on alleged misrepresentations, a plaintiff must show: 1) that a defendant was a fiduciary of the ERISA plan, 2) that a defendant breached its fiduciary responsibilities under the plan, and 3) that the participant is in need of injunctive or other appropriate equitable relief to

remedy the violation or enforce the plan. *Griggs v. E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 379-380 (4th Cir.2001)(" *Griggs I* "); *Blair v. Young Phillips Corp.*, 235 F.Supp.2d 465, 470 (M.D.N.C.2002).

A "person is a fiduciary with respect to a plan," and therefore subject to ERISA fiduciary duties, "to the extent" that he or she "exercises any discretionary authority or discretionary control respecting management" of the plan, or "has any discretionary authority or discretionary responsibility in the administration" of the plan. *Varity*, 516 U.S. at 489 (quoting ERISA § 3(21)(A)). Fiduciary status is not an all-or-nothing concept. The inclusion of the phrase "to the extent" in 29 U.S.C. § 1002(21)(A) means a party is a fiduciary only as to the activities which bring the person within the definition. *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 60-61 (4th Cir.1992). When determining whether a party is a fiduciary, "a court must ask whether a person is a fiduciary with respect to the particular activity at issue." *Id.* A court is required to examine the relevant documents to determine whether the conduct at issue was within the formal allocation of responsibilities under the plan documents and, if not, ascertain whether, in fact, a party voluntarily assumed such responsibility for the conduct at issue. *Coleman*, 969 F.2d at 61; *Phelps v. C.T. Enters., Inc.*, 394 F.3d 213, 219 (4th Cir.2005).

In *Varity*, the Supreme Court concluded that based on the factual context in which the statements were made as well as the plan-related nature of the activity engaged

in by those who had plan-related authority to do so, there was sufficient support for the legal conclusion that Varity was acting as a fiduciary. *Varity*, 516 U.S. at 503. The Court emphasized that "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power 'appropriate' to carrying out a plan purpose." *Id.* at 502. Moreover, the court noted that "other documents came from those within the firm who had authority to communicate as fiduciaries with plan beneficiaries." *Id.* at 503. Contrary to Appellants' assertions, the specific context for the Pittston Employees' statements in this case significantly differ from that which the Supreme Court recognized in *Varity*.

Pittston was both employer and administrator for the benefit plan. However, not all of Pittston's business activities involved plan management or administration. *See id.* The district court held that when the statements were made regarding employee benefits, Pittston employees were not acting as "fiduciaries" as well as "employers." In reviewing this legal conclusion, we give deference to the factual findings of the district court, recognizing its comparative advantage in understanding the specific context in which the events of this case arose. *See id.* The Court will examine the specific factual context of the alleged misrepresentations to determine whether each individual was a fiduciary.

Appellants assert that Gerald Spindler was a fiduciary. However, the evidence reveals that Spindler

had no responsibilities with respect to the Pittston plan. Spindler, in addition to Quillen, Fox, Robinette, Miller and Needy possessed no discretionary authority to alter the terms of the Pittston Plan or to determine eligibility for benefits or the amount of benefits a participant was entitled to under the Pittston plan. JA 3065. Despite this, Appellants assert that when Spindler reassured Paramont employees that their Paramont time would be used for calculating benefit accrual service under the Pittston Plan he was acting as a fiduciary. (Appellant's Br., 38.) The Court disagrees.

In *Varity,* the Supreme Court focused on the purpose of the meeting and the actions of the parties. Specifically, the Court emphasized that offering beneficiaries detailed plan information in order to help them decide whether to remain with the plan is essentially an exercise of a power "appropriate" to carrying out an important plan purpose. Moreover, in *Varity* the materials used at the meeting came from those at the firm with authority to communicate as fiduciaries with beneficiaries. *Varity,* 516 U.S. at 502. Here, the circumstances of the Clinch Valley College meeting were different.

Unlike the meeting in *Varity,* the purpose of the Clinch Valley College Meeting was not to offer beneficiaries detailed plan information in order to help them decide whether to remain with the plan. In fact, testimony in the district court reveals that Spindler's only communication regarding benefits was an answer to a question at the end of a meeting. JA 741. In addition, the evidence does not suggest that there were any

benefit-related materials used at the meeting that came from those at the firm with authority to communicate as fiduciaries with beneficiaries. *See Varity*, 516 U.S. at 502. The situation here can also be distinguished from *Griggs I* because Griggs suffered a very specific harm by relying on written documents from the Plan Administrator. *See Griggs I*, 237 F.3d at 374. It is evident that Spindler possessed no discretionary authority with respect to the Pittston Plan; moreover, he never offered detailed plan information with the intention of inducing a particular choice of plans. *See Varity*, 516 U.S. at 502.

Appellants also assert that Michael Quillen was delegated fiduciary responsibilities by the Administrative Committee and that he had apparent authority to speak on behalf of the Plan. (Appellants' Br., 39.) Appellants cite various documents and oral statements in support of this assertion. (Appellants' Br., 39-41.) However, the district court found that Quillen possessed no discretionary authority to alter the terms of the Pittston Plan or determine eligibility for benefits. Based on the evidence presented, this Court finds that this statement of fact is not clearly erroneous. Quillen testified that he never had any administrative responsibility, any control over, or any discretion regarding the Pittston Plan. JA 2991. Also, the documents and oral statements that Appellants cite to in order to establish that Quillen had authority were contained when Quillen was President of Paramont and trustee of the Paramont Plans before their merger into the Pittston Plan. JA 2991.

Appellants additionally assert that Robinette, Ratliff, Fox, Miller, and Needy were all fiduciaries of the Plan because ERISA defines fiduciary status "functionally," where virtually any employee who communicates on benefits issues may be considered a fiduciary. (Appellants' Br., 41-42.) Appellants argue that the local human resource managers were delegated actual authority to answer questions regarding plan benefits. (Appellants' Br., 42.) Further, Appellants support their argument with the following assertions: (1) Kathy Fox trained Paramont's administrative personnel on the Pittston Plan so they could explain benefits to Paramont employees; (2) Donald Ratliff traveled to mine sites explaining Pittston plan benefits; (3) Randy Robinette was Paramont's Director of Human Resources and, in this capacity, sent various letters and memos to Paramont employees explaining the effects of the Pittston-Paramont merger. (Appellants' Br., 44.) Appellants aver that the aforementioned facts reveal that these persons were involved in the administration of the Plan and subject to fiduciary obligations. (Appellants' Br., 44.)

However, the district court found that Needy performed no functions with regard to the Pittston Plan and based on the evidence presented, the Court does not find this decision to be clearly erroneous. The district court also found that Fox, Robinette, and Miller performed certain administrative duties for the Pittston Plan but lacked any discretionary authority to determine the eligibility for benefits or the amount of benefits to which a participant was entitled. JA 3065. Based on the

evidence presented, the Court finds that these individuals were not fiduciaries.

Ministerial administrative acts are not fiduciary acts. *Healthsouth Rehab. Hosp. v. Am. Natl' Red Cross*, 101 F.3d 1005, 1009 (4th Cir.1996) (stating that the limited role in processing claims and reading a computer screen to determine who is covered by a plan is not a fiduciary act). Even if Fox trained other employees to explain Pittston Plan benefits and Ratliff and Robinette explained plan benefits at mine sites and in writing, these actions fail to constitute the exercise of "discretionary authority or discretionary control respecting management" or administration of the Pittston Plan. 29 U.S.C. § 1002(21)(A) (2007).

The Court agrees that an employer/plan administrator does not exercise discretionary authority or control over the administration of the plan merely when employees tell each other about plan benefits. As in *Coleman*, the discretionary authority or responsibility which is pivotal to the statutory definition of "fiduciary" is allocated by the plan documents themselves. *Coleman*, 969 F.2d at 61. In examining the specific context of the alleged misrepresentations, the Court finds it significant that the Pittston Plan administrators clearly and accurately communicated the plan benefits to the Paramont employees in writing. JA 307-3048. Based on the record, none of the alleged statements of the speakers deprived Appellants of any benefits to which they were entitled under the terms of the plan. All of the Appellants will receive the "contractually defined" benefits that their Plan provided.

In an effort to interpret ERISA's fiduciary duties, "courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity*, 516 U.S. at 497. In resolving this issue, the Court is sensitive to these competing purposes.

B.

Appellants contend that Pittston and other fiduciaries breached their fiduciary duty to Appellants by misrepresenting that their years of service under the Paramont retirement plans would be included in the calculation of benefit accrual service under the Pittston Pension Plan. (Appellants' Br., 45.) Appellants cite to the *Varity* holding to support the proposition that misleading plan beneficiaries violates a fiduciary duty imposed upon plan administrators by ERISA. *Id.* However, the district court found that no misrepresentations were made to any Appellant, with the exception of Christopher Brooks Addington. The Court concurs with this factual conclusion.

Findings of fact by a trial court shall not be set aside unless clearly erroneous. Fed.R.Civ.P. 52(a). *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the

reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

With the exception of Addington, the district court found that the Pittston Plan administrators clearly and accurately communicated the plan benefits to the Paramont employees in writing.[3] JA 3047-3048. Based

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3. Specifically, the district court made the following findings: ". . . the uncontradicted evidence shows that, in the fall of 1988, prior to the merger of the Paramont Plans into the Pittston Plan, every then-current employee of Paramont received notice on at least two occasions that they would receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of their retirement benefits under the Pittston Plan. These notices came in the form of Robinette's 11-10-88 Letter, (Exhibit 3), and the Paramont Pride Article, (Exhibit 26). Further, a number of other accurate communications were distributed to Paramont employees after the merger of the Paramont Plans into the Pittston Plan on January 1, 1989. Miller's 4-10-90 Letter was distributed to all Paramont employees. Miller's 4-10-90 Letter states that Paramont employees' pension benefits consisted of two parts, "your pension benefits from the Paramont Plan through December 31, 1988, and your pension benefit from the Pittston Plan from January 1, 1989." Perkins's 5-15-90 Letter also was distributed to all Paramont employees. Attached to Perkins's 5-15-90 Letter was a sample pension benefits calculation. This sample calculation used a hypothetical individual who had 14 years prior service with Paramont and eight years service under the Pittston Plan. The sample did not include the employee's time with Paramont in the calculation of benefits under the Pittston Plan, but instead used only the eight

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on the evidence presented at trial, the Court agrees that there was no concerted corporate wide effort to purposefully deceive Paramount employees with regard to their plan coverage for pension benefits. Likewise, there was no concerted effort to deceive employees about how their pension benefits would be calculated under the Pittston Plan after the merger of the Paramount Plans into it. Because the facts here distinguish this case from *Varity*, in order for Appellants to succeed with their breach of fiduciary duty claim based on alleged misrepresentations, they must prove that specific misrepresentations were made to them individually. However, because the Court determines that the named

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years of service under the Pittston Plan. JA 3048. With the exception of the five plaintiffs, Quillen and Rennie, every other witness who testified in this case stated that they understood at the time of the merger of the Paramount Plans into the Pittston Plan that Paramount employees' service from only January 1, 1989, forward would be used to calculate their retirement benefits under the Pittston Plan. These witnesses included upper level management with Pittston and Pittston Coal, management personnel with Paramount and Pyxis, Pittston and Pittston Coal human resources personnel, and individuals in the local human resources departments responsible for answering Paramount employee inquiries. JA 3048. Also, while there was evidence that there were errors in the calculation of retirement benefits provided to Paramount employees through Pittston's Annual Benefit Statements beginning as early as 1991, this evidence also reveals that of the 836 Annual Benefit Statements sent to the plaintiffs in this case, only eight percent contained an incorrect calculation of their retirement benefits. Also, of the 132 original plaintiffs in this case, the evidence shows that only 16 received one or more incorrect Annual Benefit Statements.

individuals were not fiduciaries of the Pittston Plan, the Court will not further address the merits of Appellants' misrepresentation claims. Therefore, the Court affirms the district court's holding that there were not misrepresentations by fiduciaries. Because this Court finds that there has been no breach or violation of fiduciary duty the statute of limitations issue is moot and will not be addressed.[4]

C.

Appellants aver that the district court erred in dismissing Appellants' claims for benefits under ERISA § 502(a)(1)(B).[5] Appellants urge the Court to consider

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4. Although the Court determines that Appellees did not breach their fiduciary duty with respect to Addington, the Court will still discuss the statute of limitations issue because Appellees seek to recover the mistaken overpayment issued to him. According to 29 U.S .C. § 1113, "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of-(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." Because the evidence reveals that Addington did not know that the letter contained any misrepresentation until the Fall of 1999 and the case was filed in December of 2001, Addington's claim was filed less than three years after he learned of the misrepresentation.

5. ERISA § 502(a)states: "A civil action may be brought-(1) by a participant or beneficiary-(B) to recover benefits due to him

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the Pittston Plan as a whole when determining whether or not the Plan is ambiguous. (Appellants' Br., 65.) Furthermore, Appellants argue that Exhibit G is ambiguous because there is nothing in Exhibit G that excludes benefit service with Paramont in the calculation of benefits under the Pittston Plan. (Appellants' Br., 65.) Again, the Court disagrees.

The Paramont Plans were merged into the Pittston Plan effective January 1, 1989. However, before it was effective, there was an amendment of the Pittston Plan to add Exhibit G. Exhibit G states in part that the accrued pension benefit in respect of periods of service prior to January 1, 1989, "shall be determined solely in accordance with the provisions of the Paramont Plan in which he was a Participant, as in effect immediately prior to January 1, 1989, based solely on his 'Benefit Service' (as defined in such Paramont Plan) on December 31, 1988 or any earlier date on which the Paramont Participant ceases to be an employee of Paramont Coal Corporation . . ." JA 315, 2964. Exhibit G also states that vesting service under the Paramont Plans would count as vesting service under the Pittston Plan. JA 315.

The Court finds that the language of Exhibit G is clear and unambiguous. Paramont employee retirement benefits for periods of service prior to January 1, 1989, the date of the plan merger, are to be determined by the

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under the terms of his plan to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. 29 U.S.C. § 1132(a)(1)(B)."

Paramont Plan. Also, Article IV of the Plan provides further guidance by stating that "the commencement dates for the benefit accrual computation periods for Employees of specified employers is included in Exhibit M." JA 170. Exhibit M presents a chart that displays the benefit accrual period start date based on an employee's company. Based on an examination of the Pittston Plan as a whole, the district court correctly awarded summary judgment to Pittston on Plaintiffs' § 502(a)(1)(B) claims. The language of the plan is not ambiguous.

III.

A.

On cross-appeal, Appellees assert that the district court wrongly held that the Administrative Committee's mistaken overcalculation of pension benefits breached a fiduciary duty to Addington. (Appellees' Br., 69.) Appellees do not contest that the Administrative Committee is a Pittston Plan fiduciary. However, they assert that there is no evidence that it breached any fiduciary duty to Addington when it sent him a letter overstating the amount of his pension benefits and overpaying him for five years. (Appellees' Br., 69.) The Court disagrees and holds that Pittston did violate its fiduciary duty to Addington because Pittston had an "unyielding duty of loyalty to the beneficiary." *Griggs I*, 237 F.3d at 380. The Court finds that Pittston's fiduciary duty "encompass[es] more than merely a duty to refrain from intentionally misleading a beneficiary," but also

includes a duty "not to misinform employees through material misrepresentations." *Id.*

The lack of intent to deceive does not insulate the Administrative Committee from liability based on the misrepresentation to Addington. Under ERISA, a fiduciary has a duty to provide beneficiaries with accurate information. *See id.; Faircloth,* 91 F.3d 648, 656 (4th Cir.1996). Moreover, in *Krohn v. Huron Mem'l Hosp.,* the Sixth Circuit stated that "a fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally." 173 F.3d 542, 547 (6th Cir.1999).

The Court finds that the Administrative Committee breached its duty of loyalty and care by sending inaccurate communications to Addington. Parsley was a ministerial employee who calculated pensions according to the terms of the Pittston Plan. JA 3039. The Administrative Committee's 1-27-95 Letter to Addington did not contain accurate information concerning Addington's monthly pension benefits under the Pittston Plan. By relying on Parsley's incorrect calculation, the Administrative Committee's subsequent misrepresentation clearly violated its fiduciary duty to communicate accurately with a plan beneficiary.

B.

Appellees argue that the district court clearly erred when it found that Addington relied on the mistaken calculation in deciding to retire early. The district court found that had Addington "been given accurate information concerning the amount of his monthly pension benefits, he would not have taken early retirement." JA 3191-3192. The Court does not find this determination to be clearly erroneous.

Appellees argue that no equitable relief is appropriate in this case. They state that Addington could not have relied on the information contained in the Administrative Committee's 1-27-95 letter because it was received after he took early retirement. (Appellants' Br., 74.) Contrary to this assertion, the district court found that Addington's benefits were not approved until the Administrative Committee sent out the 1-27-95 letter which states, "The Administrative Committee has approved your application for early retirement benefits . . ." JA 3191. Addington testified that, if he had been given accurate information concerning the amount of his monthly pension benefits, he would not have taken early retirement. JA 3192. Although Appellees dismiss this claim as inaccurate and self-serving, the district court did not doubt Addington's credibility and it is quite possible that Addington was waiting on the approval letter to finalize his decision. Based on the facts, the Court is not left with a definite and firm conviction that a mistake has been committed in determining that Addington relied on the mistaken calculation. *See United*

States v. United States Gypsum Co., 333 U.S. 364, 394-395, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

C.

Because the Court determines that Addington relied and continues to rely on the mistaken calculation and subsequent payment by the Administrative Committee, it is necessary to determine the appropriate remedy in this situation. Appellees do not ask that Addington return the overpayment before receiving any future plan payments. (Appellee's Br., 76.) However, Appellees contend that any rescission remedy should require Addington to repay the overpaid pension benefits by offsetting any overpayment against any past payment due Addington. The Court disagrees.

The district court ordered that the Pittston Plan rescind Addington's election to retire early and raise his benefit to the $1256.00 monthly benefit he would have earned had he worked until his normal retirement date of November 1, 1997. JA 3196. Appellees contend that Addington has received an overpayment because he received $2, 140.43 monthly from January 1995 until January 2000. JA 3059. However, the district court stated that it would be "unreasonable and inequitable" to order Addington to return "any of the early retirement he received." JA 3193, 3205. The Court agrees that partial rescission was proper in this case.

Although Appellees argue that the facts in this case do not justify partial rescission as necessary or equitable,

this Court finds that the district court properly weighed the equities in its decision not to order Addington to repay incorrectly calculated pension payments. The evidence does not suggest that the mistaken pension distribution was caused by Addington but rather was the result of the Administrative Committee's miscalculations. *See Phillips v. Maritime Association-I.L.A. Local Pension Plan,* 194 F.Supp.2d 549, 555 (E.D.Tex.2001) (stating that while fault does not necessarily preclude restitution, a party's culpability is an appropriate equitable consideration). To punish Addington by forcing him to repay pension benefits that he received as the result of a mistake made by the Administrative Committee is contrary to the primary purpose of ERISA, which is to protect plan participants. The Court intends to restore Addington, as much as possible, to the position he would have been in had the mistake never been made without inflicting unnecessary injury on an innocent beneficiary.

The Supreme Court and this Court have expressly authorized federal courts to develop a federal common law of rights and obligations under ERISA-regulated plans. *Provident Life & Acc. Ins. Co. v. Waller,* 906 F.2d 985, 990 (4th Cir.1990). In *Varity,* the Supreme Court recognized that courts will keep in mind the special nature and purpose of employee benefit plans in fashioning 'appropriate' equitable relief. *Varity,* 516 U.S. at 515. Federal common-law restitution is to be used to further the purposes of ERISA and is governed by general equitable principles. *Luby v. Teamsters Health, Welfare, and Pension Trust Funds,* 944 F.2d 1176 (3rd Cir.1991).

Appendix A

In *Griggs I*, this Court determined that reinstatement of employment is an appropriate equitable remedy when an employee had been induced to accept early retirement based on incomplete or inaccurate information for which the plan administrator could be held responsible. 237 F.3d at 385. However, based on Addington's situation, rescission of Addington's election to take early retirement and reinstatement to his former position is not appropriate or possible. Here, Addington took early retirement effective January 1, 1995 and has been out of the work force for approximately 12 years. Addington is currently 72 years old and Pittston has sold all of its coal mining operations. JA 3192. However, it does appear equitable and appropriate for the court to order that Addington be allowed to rescind his election for early retirement benefits and to reinstate him to the benefits he would be entitled to under the Pittston Plan if he had continued to work until his normal retirement date of November 1, 1997, which would be $1,256.00.

Normally, equitable rescission involves a restoration of the parties to the status quo as it existed before the rescinded transaction. *See Printer v. Dahl*, 486 U.S. 622, 642 n. 18, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988) (noting that equitable rescission provides for restoration of the status quo). However, this Court in *Griggs II* stated that "the complete-restoration requirement is a general one that is subject to certain exceptions" and also stated that courts of equity may order rescission "where the equities of the situation so demanded." *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 448-49 (4th Cir.2004) ("*Griggs II*"). Further, the Court stated that the

formulation of the exception is somewhat broad to give federal courts the flexibility to appropriately balance the interests of participants and beneficiaries of ERISA plans against the interests and obligations of employers and fiduciaries. *Id.* at 449. Additionally, the Court stated that "a rule generally requiring full restoration of benefits to accompany a grant of rescission protects the financial integrity of ERISA plans, while permitting an exception to this rule when the equities of the situation demand[,] provides a necessary incentive for ERISA fiduciaries to take seriously their obligations to protect the interests of the participants and beneficiaries." *Id.* The Court finds that when applying this rule and the potential exception to the facts, it would be unreasonable and inequitable to order Addington to return any of the early retirement benefits he received or to offset the overpayment against any future payment in order to rescind his early retirement election.

The responsibility for the miscalculation of Addington's early retirement benefits lies with the Pittston Plan and with the Pittston employees who were entrusted with the task of computing his benefits. Because of Appellees' mistakes, Addington and his wife detrimentally relied on a stated monthly early retirement payment and have lived according to this fixed monthly standard for many years. *See Kaliszewski v. Sheet Metal Workers' National Pension Fund,* No. 03-216E, 2005 WL 2297309, at *8 (W.D.Pa., July 19, 2005) (highlighting the significant equitable concerns regarding the nine-year duration and extent of Plaintiff's reliance on the Fund's erroneous pension information

and benefit payments, as to, e.g., lifestyle and financial planning in denying Defendant's motion for summary judgment). Thus, the equities of the situation demand an exception to the full restoration rule in order to protect Addington and provide a necessary incentive for Pittston to ensure that they are protecting the interests of future participants and beneficiaries. The Court affirms the district court finding that Addington does not have to repay the overpaid pension benefits.

For the reasons stated herein, the judgment of the district court is

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, BIG STONE GAP DIVISION DATED MARCH 17, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA BIG STONE GAP DIVISION

Case No. 2:02cv00044

JIMMY ADAMS, *et al.*,

Plaintiffs,

v.

THE BRINK'S COMPANY, et al.,

Defendants.

MEMORANDUM OPINION

By: Pamela Meade Sargent,
United States Magistrate Judge

This case involves the claims of 124 plaintiffs[1] against their current or former employer, Paramont Coal

1. This court previously stated that this case involves the claims of 123 plaintiffs. After reviewing the court's docket with the List of Plaintiffs Pursuing Their Claims filed on September 9, 2005, (Docket Item No. 189), it appears that the case involves the claims of 124 plaintiffs. These plaintiffs include:

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Corporation, ("Paramont"), its parent company, the Brink's Company, ("Brink's"), the Brink's Company Pension-Retirement Plan, ("the Brink's Plan"), and the Administrative Committee for Brink's Company Pension-Retirement Plan, ("the Administrative Committee"). The plaintiffs seek declaratory and equitable relief as well as damages under various claims related to the administration of the Brink's Plan. Jurisdiction over this matter is based upon federal question jurisdiction, *see* 28 U.S.C. § 1331, under the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001 *et seq.* The case is before the undersigned magistrate judge by consent of the parties pursuant to 28 U.S.C. § 636(c)(1).

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• The five plaintiffs whose claims were tried to the court on February 22 to March 21, 2005;

• Each of the additional plaintiffs listed on the List of Plaintiffs Pursuing Their Claims, with the exception of Richard Hughes, whose claims were terminated by order of the court dated May 4, 2005, (Docket Item No. 99), and Martin Bledsoe and Mike Falin, who were not listed as plaintiffs in the Complaint or Amended Complaint and who have not subsequently been added as plaintiffs by court order; and

• The claims of Martin Jessee, whose claims have not been dismissed, but whose name is not listed on the List of Plaintiffs Pursuing Their Claims. It should be noted that, while Martin Jessee's name is not listed on the List of Plaintiffs Pursuing Their Claims, the docket reflects that this document as well as the Plaintiffs' Response To Defendants' Second Motion For Summary Judgment were filed on his behalf.

Appendix B

The Complaint sought recovery based on claims alleging breach of contract, estoppel, the creation of an informal plan, the reduction of accrued benefits and breach of fiduciary duty. By Memorandum Opinion and Order entered November 18, 2003, the court granted in part and denied in part the defendants' Motion For Summary Judgment. (Docket Item No. 85.) As a result, the court granted summary judgment in favor of the defendants on the plaintiffs' claims alleging breach of contract, estoppel, the creation of an informal plan and the reduction of accrued benefits. The court, at that time, denied the defendants' Motion For Summary Judgment on the plaintiffs' claims alleging breach of fiduciary duty.

By agreed order entered October 7, 2004, the parties agreed to sever the claims of five of the 124 plaintiffs to be tried to the court first. (Docket Item No. 112.) The remaining breach of fiduciary duty claims of those five plaintiffs, Christopher "Brooks" Addington, Jack Blanton, Alton Lawson Jr., Ricky D. Meade and Donald Ratliff, were tried to the court February 22 to March 1, 2005. By Findings of Fact and Conclusions of Law issued June 3, 2005, the court found that the Administrative Committee had breached its fiduciary duty owed Addington when it inaccurately informed him that his monthly early retirement benefits under the Pittston Plan would be $2,140. The court found no breach of fiduciary duty to the other four plaintiff whose claims were tried.

This case is currently before the court on the Defendants' Second Motion For Summary Judgment,

(Docket Item No. 190), ("the Motion"), seeking entry of summary judgment in the defendants' favor on the breach of fiduciary duty claims of the remaining 119 plaintiffs, ("the Remaining Plaintiffs"). The defendants argue that summary judgment should be entered in their favor on the remaining claims because there is no genuine issue of material fact as to the following:

1. The Remaining Plaintiffs' claims rely on alleged oral representations made by persons who were not acting in a fiduciary capacity;

2. The Remaining Plaintiffs' claims are barred by the applicable statute of limitations;

3. There was no breach of fiduciary duty to the Remaining Plaintiffs in that there were no misrepresentations to these plaintiffs; and

4. There is no appropriate equitable remedy available to the Remaining Plaintiffs.

The defendants also argue that the claims of deceased plaintiff Ray Taylor should be dismissed because he failed to respond to discovery requests. The defendants further argue that the court should dismiss the claims of any other plaintiff who did not provide supplemental discovery responses as ordered by the court.

In support of their Motion, the defendants have filed discovery responses from each of the Remaining Plaintiffs, as well as several affidavits and excerpts of

deposition testimony. The Remaining Plaintiffs state that they rely on all of the evidence previously put before the court when the claims of the Initial Plaintiffs were tried as well as their discovery responses filed by the defendants.

Facts

The Pittston Company, ("Pittston"), changed its name to The Brink's Company, and the Pension-Retirement Plan of The Pittston Company and its Subsidiaries changed its name to The Brink's Company Pension-Retirement Plan in 2003. Therefore, any references to "Pittston" and "Brink's" will be interchangeable and refer to The Brink's Company, and any references to the "Brink's Plan" or the "Pittston Plan" will be interchangeable and refer to the Brink's Company Pension-Retirement Plan.

Pyxis Resources, ("Pyxis"), then a subsidiary of Pittston, acquired Paramont on July 7, 1986. Pyxis was a Participating Company in the Pittston Plan since before January 1, 1988. At the time of its acquisition by Pyxis, Paramont's employees all were participants in one of two identical defined-benefit pension plans, the Salaried Employees' Pension Plan of Paramont Coal Corporation or the Hourly Employees' Pension Plan of Paramont Coal Corporation, (collectively, "the Paramont Plans"). The Paramont Plans did not require any employee contributions and provided a maximum monthly retirement benefit of $350 for 20 years of service with Paramont. Under the Paramont Plans, all Paramont

employees, regardless of their salary, earned the same retirement benefit for the same years of service.

The Pittston Plan also is a defined-benefit plan. Under the Pittston Plan, a Participant's retirement benefits are calculated based on multiplying a percentage of an Average Salary by the number of years of "Benefit Accrual Service." Section 4.04 of the December 11, 1987, and the January 1, 1989, Plans, states: " *Service Prior to Participation.* The Board [of Directors] shall determine to what extent Benefit Accrual Service shall be credited to any Participant for service for any Subsidiary or Division prior to the date such Subsidiary or Division became a Company."

On September 9, 1988, Pittston's Board of Directors amended the 1987 Plan to allow the Administrative Committee to adopt amendments to the Plan. On November 18, 1988, the Administrative Committee amended the 1987 Plan to add Exhibit G. Exhibit G merged the Paramont Plans into the Pittston Plan effective January 1, 1989. Exhibit G is entitled " *Special Provisions Applicable to Former Participants in the Pension Plans of Paramont Coal Corporation.*" The initial paragraph of Exhibit G states: "In connection with such mergers, the provisions of this Exhibit G shall apply, effective January 1, 1989, notwithstanding any provisions elsewhere in the Plan to the contrary." Exhibit G further states in part:

> (ii) The accrued pension benefit of each Paramont Participant under the Plan in

> respect of periods of service prior to January 1, 1989 shall be determined solely in accordance with the provisions of the Paramont Plan in which he was a Participant, as in effect immediately prior to January 1, 1989, based solely on his "Benefit Service" (as defined in such Paramont Plan) on December 31, 1988 or any earlier date on which the Paramont Participant ceases to be an employee of Paramont Coal Corporation. . . .
>
> (iii) The accrued pension benefit of each Paramont Participant in respect of periods of service as an employee of Paramont from and after January 1, 1989 . . . shall be determined solely in accordance with the provisions of the Plan. . . .

This court previously found that the language of Exhibit G is clear and unambiguous and does not provide for the inclusion of plaintiffs' years of service with Paramont prior to January 1, 1989, in the Benefit Accrual Service used to calculate a portion of their retirement benefits under the Pittston Plan. *See Adams v. The Brink's Co.*, Civ. No. 2:02cv00044, Docket Item No. 80 (W.D.Va. July 28, 2003) (Report and Recommendation), Docket Item No. 85 (W.D.Va. Nov. 18, 2003) (Order adopting Report and Recommendation) and Docket Item No. 130 (W.D.Va. Jan. 18, 2005) (Memorandum Opinion on Plaintiffs' Motion for Reconsideration).

Thus, under the amended Pittston Plan, and this court's rulings, Paramont employees are entitled to receive the retirement benefit that they accrued under the Paramont Plans through December 31, 1988, and the benefits they accrued under the Pittston Plan for periods of service after January 1, 1989. Paramont employees also received vesting credit under the Pittston Plan for all of their years of service with Paramont.

The Remaining Plaintiffs, with the exception of Jerry W. Baird, Glenda Brady, Scotty Hamilton, Danny Hayes, James Roger Jones, Robin Lovell, Roger Morgan, Franklin D. Mullins and Dennis Rasnick, base their breach of fiduciary duty claims on various alleged oral misrepresentations. Of the 119 Remaining Plaintiffs, 108 refer to a meeting with all the employees of Pyxis's operating companies, including all Paramont employees, held at Clinch Valley College at the conclusion of the Pittston-UMWA strike in early 1990, ("the Clinch Valley Meeting"). At this meeting, Gerald Spindler, President of Pittston Coal Group, responded to questions raised by audience members. Most of the Remaining Plaintiffs base their claims, at least in part, on representations they allege that Spindler or others made at this meeting. Many of the Remaining Plaintiffs also cite other alleged oral representations made on other occasions. Each of the Remaining Plaintiffs, with the exception of the Estate of Ray Taylor, has provided responses to defendants' discovery requests which identified the following former Pittston and Paramont employees, some of whom are plaintiffs in this case, as making these alleged misrepresentations: Michael Quillen, Gerald

Spindler, Eddie Neely, Rhonda Miller, Randy Robinette, Kathy Fox, Christopher "Brooks" Addington, Jim Campbell, Mike Clark, Cline Childress, Harry Boone, Wendell Collinsworth, Ralph Dado, James M. Davis, Carl Dotson, Joseph Farrell, Steve Horton, James Roger Jones, R. Dwane McConnell, Ron Orender, Scott Perkins, Dennis Rasnick, Donald Ratliff and Gary Swiney.

In consideration of the Motion, the court has reviewed the discovery responses provided by each of the Remaining Plaintiffs. While these discovery responses contain allegations of various oral statements made by various former Pittston and Paramont employees on various occasions, the substance of many of these statements is similar.

Jimmy Adams attended the Clinch Valley Meeting, but he has provided no evidence as to any specific misrepresentation made to him at this meeting or who made the misrepresentation. In particular, Adams has stated only that, "I understood that our Paramont years would carry over to the Pittston plan." Appendix 2(1) to the Defendants' Memorandum In Support Of Second Motion For Summary Judgment, (hereinafter referred to as "Appendix"). Adams further alleges that, "I remember Scott Perkins also being at that meeting. I don't remember who made the statements, but I do remember what was said about the Paramont years carrying over to the Pittston Plan." Adams does not provide any evidence, however, of what he remembers was said.

Appendix B

Willie Thacker, ("W. Thacker"), states that, at the Clinch Valley Meeting, "Spindler told us that our time with Paramont would carry over into the Pittston plan for retirement benefit purposes." Appendix 2(107). Robert L. Smallwood states that, at the Clinch Valley Meeting, "Johnny Castle asked Gerry Spindler about our retirement benefits. Spindler told Johnny Castle that the Pittston pension plan was better than the Paramont plan and that we would all be covered under the Pittston plan. Johnny then asked if our Paramont time would carry over to the Pittston plan and Spindler said it would." Appendix 2(98). Danny C. Hayes also states that, at the Clinch Valley Meeting, Spindler stated that "our Paramont years would carry over to the Pittston plan for benefit purposes." Appendix 2(44).

Johnny Ray Mullins, ("J. Mullins"), states that, at the Clinch Valley Meeting, Spindler "told us that Pittston had bought Paramont and the Paramont retirement would continue. Also that Paramont years of service would carry over into the Pittston plan and would be honored." Appendix 2(77). Johnny W. Farmer, ("J. Farmer"), states that, at the Clinch Valley Meeting, Spindler said that "my Paramont Time would be carried over to the Pittston Retirement. . . ." Appendix 2(34). J. Farmer also alleges that Quillen and Robinette told workers that "our time with Paramont would carry into the Pittston Retirement Plan" at a meeting in either late 1987 or early 1988 at the Ramsey Preparation Plant.

Billy Bullion states that, at the Clinch Valley Meeting, Spindler said "that my years of service with

Paramont would carry over to the Pittston plan and count toward my retirement." Appendix 2(13). Bullion alleges that Quillen came to the Dorchester job site and made the same representation, but he provides no date for this representation other than to say that it occurred "around the same time" as the Clinch Valley Meeting.

Thelmer Lee Cantrell, ("T. Cantrell"), states that, "Rhonda Miller told me that my years of service with Paramont would be carried over and be part of the calculation of my Pittston retirement benefit. Mike Quillen also spoke to me and others and told me that my retirement benefits would be based on my years worked with Pittston and Paramont." Appendix 2(20). T. Cantrell does not provide a date for these representations. He does state that he attended the Clinch Valley Meeting and that the same representation was made at that meeting, but he does not remember who made the representation.

Vernus Allen Culbertson states that, at the Clinch Valley Meeting, Spindler said that "my years with Paramont would be carried over and included in the Pittson Plan when calculating my pension benefit. I was told that the Pittston Plan was a better retirement plan than the Paramont Plan." Appendix 2(28). Culbertston also claims this same representation was made periodically by Quillen, Miller, Perkins and Ratliff on the job site in the late 1980s.

Larry Gilliam, ("L. Gilliam"), states that, at the Clinch Valley Meeting, Spindler, Quillen and Perkins all

said that "the Pittston Plan was better and paid more than the Paramont plan. We were also told that your time with Paramont would carry over with Pittston in calculating retirement benefit." Appendix 2(37).

Phil Thacker, ("P. Thacker"), states that, at a quarterly meeting at the Ramsey Preparation Complex in 1987, "Quillen was asked if the years of service we had with Paramont prior to the buyout would count under the Pittston plan. Quillen said that the years would carry over." Appendix 2(106).

Donald M. Mullins, ("D. M. Mullins"), states that, at the Clinch Valley Meeting, Quillen and Clark said that "Paramont years of service would be included under the Pittston retirement plan." Appendix 2(74). D. M. Mullins also states that Quillen made the same representation at a meeting at Deep Mine 13 in the early 1990s. Robert S. Stapleton Jr. states that, at the Clinch Valley Meeting, Spindler talked about the merger of the Paramont and Pittston Plans. Stapleton states that Spindler said "that my Paramont time would be included in my Pittston retirement benefit." Appendix 2(100). According to Stapleton, Quillen made the same representation, but he did not provide a date for this representation.

Floyd Cantrell, ("F. Cantrell"), states that, at the Clinch Valley Meeting, Spindler said "that my years with Paramont would be included in the calculation of retirement benefits under the Pittston Plan." F. Cantrell also alleges someone "made this representation at the plant." He does not remember who made the

representation and does not provide the date of the representation.

Denver Hall and R. Dwane McConnell, ("R. McConnell"), also state that Spindler said "that my Paramont years of service would be included in the calculation of retirement benefits under the Pittston Plan" at the Clinch Valley Meeting. Appendix 2(41) & (64). Hall also states, "I believe I was told this by other person[s] but cannot remember who." R. McConnell states that Ratliff also made the same representation in a meeting at the Esserville laboratory in the early 1990s. R. McConnell also states that he was riding with Quillen in a car once when they passed union members picketing and Quillen told him that Pittston would recognize his service with Paramont so that he would not have to go through what the union employees were going through. R. McConnell does not provide a date for this statement.

Mitchell Salyers states that, "Mike Quillen, Rhonda Miller, and Donnie Ratliff told me that my Paramont time, previous to the purchase, would be included in the calculation of my Pittston pension." Appendix 2(93). Salyers does not state when these representations occurred. Salyers also states that he attended the Clinch Valley Meeting where Spindler said "the same thing."

Woodrow Lee Lovell, ("W. Lovell"), states that, at the Clinch Valley Meeting, "Spindler told me that my years with Paramont would be included in the calculation of my pension benefits under the Pittston Plan." Appendix 2(62). According to W. Lovell, "[t]his

representation was also made at a Paramont Training Center Insurance meeting. I do not remember who made this representation at the training center but the person was Rhonda Miller's boss." W. Lovell does not provide a date for this representation.

John Cantrell, ("J. Cantrell"), states that, at the Clinch Valley Meeting, Spindler said "my time with Paramont would be included in the calculation of my Pittston Pension." Appendix 2(19). J. Cantrell also alleges, "I was also told by others that my Paramont years of service would be included in the calculation of my Pittston pension but [I] do not remember who made these representations to me." James Roger Jones, ("J. Jones"), states, "I was told that my Paramont time would be included in the calculation of my Pittston pension." Appendix 2(52). J. Jones states that this representation was made by Spindler at the Clinch Valley Meeting.

Carl Thurman Dotson states that Quillen, Ratliff, Spindler, Neely, Addington and "a lady" told him that "my years with Paramont would be included in calculating my pension benefit under the Pittston Plan. I was also told that the Pittston Plan was a better plan than the Paramont Plan." Appendix 2(30). Dotson claims that these representations occurred at the Clinch Valley Meeting and at the job sites in the late 1980s. Gregory L. Clark, ("G. Clark"), attended the Clinch Valley Meeting and states that Ratliff and Spindler "told those present that years of service with Paramont would be used in calculating pension benefits under the Pittston Plan." Appendix 2(23).

Appendix B

James E. Cooke states, "Mike Quillen, Donnie Ratliff and Rhonda Miller told me that my years worked with Paramont would be included in the calculation of my Pittston pension." Appendix 2(26). Cooke claims these statements were made at Paramont's Esserville office, but he does not provide a date for these statements. Cooke also alleges that the same representation was made by Spindler at the Clinch Valley Meeting. Ival Mack Meade Jr., ("I. Meade"), states that, at the Clinch Valley Meeting, Spindler said "our Paramont time would be included in the calculation of our Pittston retirement benefit." Appendix *531 2(68). Meade also states that Davis made the same representation at the Clinch Valley Meeting.

Teddy Dean stated that, at the Clinch Valley Meeting, "[a] representative of Pittston whose name I can't remember told the group that the Paramont employees would be included in the Pittston retirement plan, which had better benefits than the Paramont plan. He also told us that our total years of employment, including time worked for Paramont, would be used in calculating our pension benefits under the Pittston Plan." Appendix 2(29). Dean also claims that he was present at several other smaller meetings held at job sites after the Clinch Valley Meeting, at which the same representations were made by other "management representatives."

Ronnie L. Lawson, ("R. Lawson"), states that, at the Clinch Valley Meeting, Spindler said, "my time spent with Paramont would be included in the Pittston

retirement plan when calculating my pension." Appendix 2(58). Lawson also states that Ratliff and Neely told him this as well, but he does not provide a date for these statements. Donald E. Mullins, ("D. E. Mullins"), states that, at the Clinch Valley Meeting, Perkins and Spindler said that "our time from Paramont would be included in the Pittston plan and our years of service started with our employment date with Paramont." Appendix 2(73). Charles Osborne states that, at the Clinch Valley Meeting, Spindler and Perkins said, "my prior years of service at Paramont would be included in the calculation of my retirement benefits under Pittston Plan." Appendix 2(82). Osborne also states, "I was told that my pension with Pittston would be secure." According to Osborne, Perkins also made these representations at various work locations, including the Paramont Shop in the late 1980s or early 1990s.

Jerry Tignor states that, at a meeting at the Paramont office in Esserville, Quillen said, "my Paramont time would be included in the calculation of my Pittston pension." Appendix 2(108). Michael Hopkins states that Quillen, Ratliff and Horton told him that "my time spent with Paramont would be included in the calculation of my Pittston pension benefits" at a meeting at the Ramsey Preparation Plant. Appendix 2(48). Hopkins does not provide a date for this meeting. Hopkins also states that he attended the Clinch Valley Meeting where "Spindler made similar representations."

Clarence Whisenhunt states that Rasnick and Quillen made representations at safety meetings that his

years with Paramont "would be included" in the calculation of his Pittston pension. Appendix 2(111). Whisenhunt does not indicate when these statements were made. According to Whisenhunt, Spindler also made this same representation at the Clinch Valley Meeting. Whisenhunt also states that he "understood that Paramont employees were being offered their Paramont time in the Pittston Plan in order to remain non-union." Michael Whitaker states that he attended a meeting for the Paramont engineering department and office staff held by "the human resources staff" at the Paramont office in Esserville in the summer of 1986, at which he was told that his Paramont time "would be included in the calculation of" his Pittston pension. Appendix 2(112). Whitaker claims that he attended the Clinch Valley Meeting, at which Perkins and Spindler spoke, but he does not provide any specific representations made at that meeting. Whitaker also states, "I had several individual conversations with my supervisor, Roger Jones, regarding the merger and Pittston's representation that all years worked for Paramont would be included in Pittston's retirement plan."

Homer E. Phipps states that a speaker at the Clinch Valley Meeting "told us that all of our Paramont time would be recognized as time served under the Pittston Pension Plan." Appendix 2(84). Phipps does not remember who the speaker was. Phipps states that the same representation was made at a retraining class at the Esserville offices taught by Rasnick between the time of Pyxis's acquisition of Paramont and the end of

1987. Phipps also states that he was told "that the Pittston Pension Plan was a much better plan."

Denver Sanders states that, at the Clinch Valley Meeting, Spindler said that "Pittston would recognize all of our Paramont time regarding the Pittston retirement plan." Appendix 2(94). Sanders also states that Perkins made the same representation at the Ramsey bathhouse and that Dado made the same representation at an annual retraining meeting. Sanders did not provide a date for these representations other than to say that the meeting at the Ramsey bathhouse occurred shortly after the Clinch Valley Meeting.

Oakley Michael Adkins attended the Clinch Valley Meeting, and he alleges that at this meeting, "Gerald Spindler stated that our Paramont years of service would count as Pittston time in calculating pension benefits under the Pittston plan." Appendix 2(2). Adkins further alleges that "Randy Robinette and Mike Quillen also represented that my years with Paramont would be included in the Pittston retirement plan." Adkins alleges that these representations were made at the Ramsey bathhouse, but he provides no date for these representations other than to say that they occurred prior to the Clinch Valley Meeting. He also alleges, "[s]imilar representations were made at annual retraining meetings by Mike Quillen, Donnie Ratliff and Rhonda Miller over the years."

Gary Mullins, ("G. Mullins"), states that, at the Clinch Valley Meeting, Spindler said that "our time with

Paramont would count as time with Pittston." Appendix 2(76). G. Mullins also states that Gary Swiney[2] and Perkins made the same statements at meetings at Deep Mine 17, but he does not provide dates for these meetings.

According to Michael A. Bledsoe, ("M. Bledsoe"), Spindler told those in attendance at the Clinch Valley Meeting that "our time with Paramont would be counted as time for Pittston for purposes of the retirement plan." Appendix 2(4). M. Bledsoe states that he recalls Ratliff, Quillen and Miller making the same representation but does not provide a date for these representations. According to Robert F. Bledsoe, Spindler told those in attendance at the Clinch Valley Meeting that "our years of service under the Paramont plan would count toward the Pittston plan." Appendix 2(5).

Roy Ronald Gilliam, ("R. Gilliam"), states that, at the Clinch Valley Meeting, Spindler said that "our years of service with Paramont would count toward our pension benefits with Pittston." Appendix 2(38). R. Gilliam also asserts that Ratliff and Rasnick told him that his years of service with Paramont would count under the Pittston Plan during annual retraining. Dane R. Hamilton, ("D. Hamilton"), states that "a Pittston representative" at the Clinch Valley Meeting said "that the Paramont retirement plan would merge with the Pittston

2. G. Mullins's discovery responses actually refer to representations made by Gary "Sweeney." It is assumed that this is a misspelling of Swiney's name.

retirement plan and that our years at Paramont would be added in with Pittston time. I also received a letter from Pittston in November 1988 signed by Robinette, which said the same thing." Appendix 2(42). D. Hamilton also states, "[w]e were told that our years with Paramont would be counted with Pittston time in calculating our retirement benefits."

Claude W. Cox states that, at the Clinch Valley Meeting, Spindler said that "all our years of service with Paramont would count toward our Pittston retirement and that the Pittston [Plan] was superior to our Paramont plan." Willie M. Falin states that, at the Clinch Valley Meeting, Spindler "told us that our Paramont years of service would be counted at Pittston time." Appendix 2(32). Falin also alleges that Quillen told him that "the buyout was a blessing and that the benefits would be better than not being bought out." Donald Kennedy states that, at the Clinch Valley Meeting, Spindler said "all my time with Paramont would be counted in with Pittston's retirement plan." Appendix 2(54). Kennedy also states that Spindler said that "the company time went with all Paramont time rolled to Pittston retirement plan." Kennedy claims that Perkins and Miller said the "same thing at the tipple," but he does not provide a date for these statements.

Michael Erwin Boggs, ("M. Boggs"), states that, at the Clinch Valley Meeting, Spindler said that "my time that I had with Paramont would count on my Pittston retirement." Appendix 2(7). M. Boggs also alleges that Quillen made the same representation from the back of

a pickup truck at the Deep Mine 6 jobsite, but he does not provide a date for this representation. Gregory L. Ireson states that, at the Clinch Valley Meeting and at "safety breaks" thereafter, "[w]e were told that all of our employment time with Paramont would count and be added to our time under The Pittston Retirement Plan." Appendix 2(50). Ireson does not recall who made these statements.

Randall A. Clark, ("R. Clark"), states that, at the Clinch Valley Meeting, Ratliff and Spindler "told us that our years of service with Paramont would count toward our pensions under the Pittston Plan." Appendix 2(25). R. Clark also alleges that he attended a meeting in the mid 1980s in the red conference room of the Paramont office, during which "Quillen and a lady from Pittston told us that our years of service with Paramont would count toward our pension benefits under the Pittston Plan." Michael W. Clark, ("M. Clark"), states that he attended the Clinch Valley Meeting, and that Spindler and Perkins "spoke to the employees and explained the merger and told us that our Paramont years of service would be counted in calculating our pension benefits under the Pittston Plan." Appendix 2(24).

Ottis M. Mullins, ("O. Mullins"), states that, at the Clinch Valley Meeting, Spindler and Miller said that "our time counted in the retirement plan from the time that we started at Paramont." Appendix 2(78). O. Mullins also states that Spindler, Miller, Addington and Childress told him that "our Paramont years would be counted under Pittston's Plan." O. Mullins states that the

representations by Addington and Childress occurred at the Esserville Shop, but he did not provide dates for these representations.

Roger Morgan states that Spindler, Miller, Quillen and others told him that "my time with Paramont would be counted in calculating my benefit under the Pittston Plan." Appendix 2(72). Morgan stated that this representation was made in the late 1980s at the Clinch Valley Meeting and by Miller at a company meeting on the job site. Morgan states that he also received benefit statements that confirmed this representation. Randy D. Mullins, ("R. Mullins"), states that "I was told . . . that our time with Paramont would count just like we had worked for Pittston all the time." Appendix 2(79). R. Mullins states that he was told this by Brooks Addington at the Esserville Shop and by Spindler and Ratliff at the Clinch Valley Meeting.

Kenneth Meade, ("K. Meade"), states that, at the Clinch Valley Meeting, Spindler was asked about retirement benefits after the sale of Paramont to Pittston. ". . . Spindler told us that our time with Paramont would count under the Pittston plan." Appendix 2(69). K. Meade further states, "The same question was asked at group meetings held at the mines both before and after the sale. We were told the same thing-that our time with Paramont would be included in our pension benefits under the Pittston plan. I also remember Ron Orender, a supervisor at Deep Mine 1, telling me that his understanding from Pittston was that all time with Paramont would be included in the Pittston plan."

Appendix B

Judy Thacker, ("J. Thacker"), states that, at the Clinch Valley Meeting, "the question was asked if our time carried when we worked for Paramont and Mr. Spindler said yes it did and our benefits would continue the same." Appendix 2(105). J. Thacker also states that, soon after Pittston bought Paramont, Miller said that "my time with Paramont would count under the Pittston retirement plan." Gary Swiney states that, at the Clinch Valley Meeting, Spindler said that "the Paramont plan was being 'absorbed' into the Pittston plan and that all of our time with Paramont would count for purposes of my pension benefit under the Pittston plan." Appendix 2(103).

Gary Williams states that he attended a meeting of all Paramont employees at Paramont's Esserville office about one month after the acquisition of Paramont by Pyxis, at which Quillen stated that "the Pittston retirement plan would take over the Paramont plan and that the years we had worked for Paramont would count in the calculation of my pension under the Pittston plan." Appendix 2(114). Ralph Wilson Jr. also states that, at the Clinch Valley Meeting, Spindler said that "our years of service would count toward our pension benefits under the Pittston Plan." Appendix 2(116).

Roy D. Jones also attended the Clinch Valley Meeting, and he remembers that Spindler, Ratliff and Perkins all "made statements to the effect that all years of service with Paramont would count toward my Pittston retirement benefit." Appendix 2(53). George L. Meade, ("G. Meade"), states that, at the Clinch Valley Meeting,

Spindler said that "the Paramont Plan would merge with the Pittston Plan. I remember that I was told that my Paramont years of service would count toward my Pittston retirement benefits." Appendix 2(66). G. Meade also states, "[o]ver the years, I remember others making this representation but do not recall anyone in particular." Ronnie N. Mullins states that, at the Clinch Valley Meeting, "Spindler told us that our Paramont time would count toward our Pittston retirement benefit." Appendix 2(80).

Danny S. Moore states that he was told on four separate occasions that "our time with Paramont would count toward our Pittston pension." Appendix 2(71). Moore states that he was told this by Spindler at the Clinch Valley Meeting, as well as by Quillen at Deep Mine 1 in 1986, and by Miller and "another person from the Pittston benefits department" whose name he cannot remember at Deep Mine 17 after the merger and again at a group meeting at the Holiday Inn in Norton. Winston M. Richardson, ("W. Richardson"), states that he attended a meeting in Esserville with other Paramont employees, at which they were told that "years of service with Paramont would be counted toward Pittston retirement benefits." Appendix 2(90). W. Richardson does not provide the name of the person who made this statement, and he does not recall the date of the meeting.

Donald Gene Childress states that, at the Clinch Valley Meeting, Spindler and Quillen "told us that our years worked with Paramont would count under the Pittston Plan." Appendix 2(21). Isaac Wade Cantrell,

("I. Cantrell"), states that, at the Clinch Valley Meeting, Spindler stated "that our time with Paramont would count under the Paramont retirement plan. I was told my hire date with Paramont would be my hire date with Pittston." Appendix 2(18). David Freeman states that, at the Clinch Valley Meeting, Spindler said that "my time with Paramont would count on my Pittston retirement and that the Pittston Plan was better than the Paramont Plan." Appendix 2(36). Homer Hill states that, at the Clinch Valley Meeting, Spindler explained "how the years we worked with Paramont would be counted on our pension when we retired from Pittston." Appendix 2(46). Jerry R. Hylton states that, at the Clinch Valley Meeting, a Pittston representative, whose name he cannot recall, "told us that all of our retirement time with Paramont would count with Pittston on our retirement plan and that the Pittston retirement plan would be a better package." Appendix 2(49).

Dusty Robinson states that, at the Clinch Valley Meeting, Spindler said that "Pittston would count our time with Paramont toward our pension benefits under the Pittston plan. . . ." Appendix 2(91). Robinson also states that, after the Clinch Valley Meeting, "I remember discussions about our pension benefits at annual safety training meetings. At these meetings members of management would make statements similar to what we were told at the Clinch Valley College meeting-that our Paramont time would be included in the calculation of our pension under the Pittston plan. I remember Dennis Rasnick, Donnie Ratliff and Carl Dotson making these statements at these meetings. I also remember receiving

a letter from Randy Robinette in late 1986 or 1987 which stated that our time with Paramont would carry over as Pittston time in the Pittston plan."

Denver L. Winebarger states that, at the Clinch Valley Meeting, "Spindler told us that all of our time with Paramont would count in the Pittston plan for our retirement benefits." Appendix 2(117). Winebarger also states that, prior to the Clinch Valley Meeting, Quillen, at the Esserville shop, "told us that Pittston was buying Paramont and that our time with Paramont would carry over into the Pittston Plan."

Arthur Wilson states, "[w]e were advised at a company-wide meeting at Clinch Valley College that [the] Paramont retirement would be merged with the Pittston Plan and all our time with Paramont would be counted under the Pittston plan. This meeting was held shortly after Pittston bought Paramont." Appendix 2(115). Wilson does not identify who made this representation. Wilson also claims that at a safety meeting at the Ramsey bathhouse Dado said that "after Paramont people became vested, Paramont time would be counted as Pittston time for purposes of our pension." Wilson states that Ratliff and Wendell Collinsworth also spoke at this meeting. According to Wilson, "we were advised that the Paramont and Pittston plans would be merged and our time would count."

David McConnell, ("D. McConnell"), states that, at the Clinch Valley Meeting, Spindler, Perkins and Miller said that "our Paramont time would count in the Pittston

Plan as of our Paramont hire date." Appendix 2(63). D. McConnell also states that Quillen made this same representation at a safety meeting at the Ramsey Preparation Plant in the winter of 1986.

John Browning Jr., ("J. Browing"), states that Mike Quillen in 1988 or 1989 told him and all of the employees at the Paramont truck shop at the Esserville facility that "our years of service with Paramont would count under the Pittston retirement plan and that our retirement would stay in place." Appendix 2(11). J. Browning states that, at the Clinch Valley Meeting, both Spindler and Perkins said "that our years of service with Paramont would count in the Pittston retirement plan." J. Browning also alleges that, after the Clinch Valley Meeting, Ratliff came to the truck shop and said "that our service with Paramont would continue under the Pittston retirement plan when calculating pension benefits." J. Browning does not provide a date for this representation.

Thomas J. Hillman states that, at the Clinch Valley Meeting, "we were told that our years with Paramont would count under the Pittston plan in calculating our retirement benefits," but he does not specify who made this statement. Hillman also states, "[w]e were told that retirement and benefits would not change after the sale to Pittston and that time with Paramont would count under the Pittston plan." Hillman does not specify who made this statement or when it was made. Arthur W. Jenkins states that, at the Clinch Valley Meeting, Spindler "told the employees present that their years of

service with Paramont would be counted in calculating pension benefits under the Pittston Plan." Appendix 2(51). Jenkins also states, "Spindler . . . told us that our years of service with Paramont would count under the Pittston Plan when they calculated our pension benefits."

Tim Lawson, ("T. Lawson"), states that Perkins and Spindler told Paramont employees at the Clinch Valley Meeting that "our Paramont time from our hire date would count under the Pittston retirement plan for benefit purposes." Appendix 2(59). T. Lawson also claims that Quillen made this same representation at a meeting at the Ramsey Preparation Plant and that Ratliff, Quillen, Perkins, Robinette and Miller made this same representation at retraining meetings, but he does not provide any dates for these representations.

Ronald Wayne Large states that, at the Clinch Valley Meeting, Spindler, Miller and Quillen said that "years of service with Paramont would be counted as years of service under the Pittston Plan in calculating our pension benefit under the Pittston Plan." Appendix 2(57). John Livingston states that he does not remember the names of the people who spoke at the Clinch Valley Meeting, but "they were management people from Paramont and Pittston." Appendix 2(60). According to Livingston, "[t]hey told us that our Paramont time would be counted with our Pittston time in calculating our retirement benefits under the Pittston Retirement Plan."

Ricky A. Shelton states that, "I was told that my Paramont time would count in the Pittston Retirement

Plan, but Pittston wasn't exactly sure how it would be done. I was told that the Pittston Retirement Plan would be better. Pittston was supposed to be a more stable company." Appendix 2(95). Shelton does not state who told him this or when he was told this. According to Shelton:

> Donnie Ratliff and Rhonda Miller often explained the future amount of retirement benefits, and always included our Paramont time in those examples and calculations. I believed that my Paramont time would be included in my Pittston retirement because of what they told me. Donnie Ratliff and Rhonda Miller assured us that we would get our Paramont retirement money because the money was "out there"—that it had been paid in and was there for us. Scott Perkins assured us that Pittston was working on a plan to roll the Paramont Plan into the Pittston Plan.
>
> Gerry Spindler said at the meeting at Clinch Valley that our Paramont time would count on our Pittston retirement; that we would lose no time.

Kenneth S. Sluss states that, at the Clinch Valley Meeting, Spindler said that "my Paramont time would be counted for all purposes in the Pittston Plan." Appendix 2(97). Sluss states that he "was told this at the mine also," but he does not state when or by whom he was told. Sluss also claims that Farrell, Ratliff, Clark

and Quillen made the same representation, but he has not provided any dates for these representations.

Danny Ray Taylor states that, at the Clinch Valley Meeting, Spindler, Perkins and Miller said that "our time with Paramont and Pittston would be counted together to calculate our retirement benefits." Appendix 2(104). Taylor states, "we were told that our Paramont time would count towards our retirement under the Pittston plan."

Ronald L. Slemp states:

> I was told that my Paramont time would count in the Pittston Retirement Plan: that Pittston was a bigger company than Paramont and was more stable as far as coal reserves. I, along with the other employees, were concerned about the company being bought out. I was told that the buy-out would benefit, and not hurt me, my income, benefits and retirement.
>
> At various meetings, specifically annual retraining sessions, and at numerous times, Donnie Ratliff always used our Paramont time when he was asked a question about retirement benefits. Because of this, and other representations made by the company, I always counted on my Paramont time being included in my Pittston retirement.

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. . .

> At the meeting at [Clinch Valley College] ..., Gerry Spindler told me that my Paramont time would count toward my Pittston retirement. I had 10-11 years with Paramont and was concerned about losing that time in the merger. I was assured that I would not lose that time. One of the employees in the group asked Gerry Spindler if our Paramont time would be recognized in the Pittston Retirement Plan, and he specifically answered, "Yes" to that question.

Appendix 2(96).

Freddy Powers states that, at the Clinch Valley Meeting, "Roger Morgan asked what would happen to prior service with Paramont and . . . Spindler said our time would count under the Pittston plan toward our pension." Appendix 2(85). Powers also states, "Shortly after this meeting I spoke with . . . Spindler, . . . Ratliff and . . . Perkins about what would happen to Paramont years of service and what was said during the meeting at Clinch Valley College. Prior to this meeting I had a conversation with . . . Quillen and we talked about what would happen to years of service prior to the buy-out by Pyxis. Mike stated that ... Spindler told him that prior years of service with Paramont would count with Pittston."

David Elam states that, at the Clinch Valley Meeting, "we were told that our retirement benefit under the Pittston plan would be based on all of our time at Paramont. I do not remember who spoke to us at this meeting but they were representatives of Pittston and Paramont." Appendix 2(31).

Freddie G. Cantrell, ("F. G. Cantrell"), states that, at the Clinch Valley Meeting, "we were told that Paramont retirement and service would merge with the Pittston retirement plan and that we would not lose any benefits after the takeover." Appendix 2(17). F. G. Cantrell does not remember who made this representation. F. G. Cantrell also admits that he received Robinette's November 10, 1988, letter stating that the Paramont Plan would merge into the Pittston Plan as of January 1, 1989. According to F. G. Cantrell, this letter stated "your benefits would be a combination of what you earned on the Paramont plan and what you[ ]earn on the Pittston plan."

Robin Lovell, ("R. Lovell"), states, "I was told that Paramont and the Pittston Plan would be merged and that I would receive[ ] pension benefits from the Pittston Plan based on my years of employment with Paramont and Pittston." Appendix 2(61). R. Lovell states that Spindler, Miller, Perkins, Ratliff and Neely made these representations from the late 1980s until the Clinch Valley Meeting, on the job sites and at the training center.

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Franklin D. Mullins, ("F. Mullins"), states that, at meetings at the Ramsey Preparation Plant, "[p]romises were made to merge pension plans to benefit Paramont plans and that Paramont years will count on Pittston retirement." Appendix 2(75). F. Mullins states that Dado and Miller made these representations but does not provide a date for the representations. Bobby G. Redman states that Miller and Perkins said "Paramont pension would roll over into Pittston Plan." Appendix 2(87). According to Redman, this statement was made "at the plant," but he does not provide a date for the statement. Redman states that Spindler made the same statement at the Clinch Valley Meeting.

Jeffrey Summers states that, at the Clinch Valley Meeting, Spindler said that "my years of service would rollover into the Pittston Plan for calculating my pension benefit. I was told that the Pittston Plan was a better plan and that I would be taken care of." Appendix 2(101). Bobby Wheeler agrees that a statement was made at the Clinch Valley Meeting that "all time with Paramont would roll-over into the Pittston retirement plan and that the Pittston retirement plan was better than the Paramont plan." Appendix 2(110). Wheeler, however, cannot remember whether it was Spindler or Farrell who made this representation. According to Summers, Perkins and Miller made these same representations at the Ramsey Preparation Plant, but he does not recall the date on which they made these representations. According to Wheeler, Mike Clark or Quillen also stated that "all time with Paramont would be rolled over to the Pittston retirement plan and that we would lose nothing" at a meeting at Deep Mine 13 in 1986 or 1987.

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Jerry W. Baird and Kim Boggs also attended the Clinch Valley Meeting, but they do not remember what was specifically said or by whom. Appendix 2(3) & (6). Each of them states, however, that after the Clinch Valley Meeting, they thought that their time with Paramont would count under the Pittston Plan. According to Baird, "I also received annual benefit statements through 1998 which reaffirmed what I believed had been represented regarding my pension benefits." Baird also alleges that he attended a meeting with Fox and Miller in the red conference room at Paramont's Esserville office in late 1986. According to Baird, "I do not recall what was specifically said at the meeting but I do recall leaving the meeting with the impression that my Paramont years of service would be credited toward my retirement Pittston benefits."

Donald Greear also attended the Clinch Valley Meeting, and he remembers that Spindler spoke, but he has not provided any particular representation made by Spindler at this meeting. Appendix 2(40). Instead, Greear states, "[i]t was my understanding after the meeting that my time with Paramont would be included in the calculation of pension benefits under the Pittston plan." Greear also alleges that Ratliff made a similar representation to him at a training meeting, but he does not recall the date of this meeting.

Lawrence Reeves states that he attended the Clinch Valley Meeting, but he does not provide any specific statements made by any specific person. Instead, he states, "[w]hen I left this meeting I believed that my

time with Paramont was going to be counted in the Pittston retirement plan." Appendix 2(88). Reeves also states, "[a]t the Esserville retraining center after the Clinch Valley meeting, I asked Donnie Ratliff was there any chance that the union half of the company would challenge the non-union [employees'] participation in the Pittston plan. Donnie told me no. Donnie also told me that my Paramont time was going to be counted in the Pittston retirement plan. These representations were also made at several safety meetings. I believe that . . . Donnie Ratliff and Wendell [Collinsworth] made these representations."

Holly Meade, ("H. Meade"), states that she attended the Clinch Valley Meeting where Spindler and Ratliff spoke. According to H. Meade, "[s]omeone present at the meeting asked whether time with Paramont would count under the Pittston retirement plan. I understood that my time with Paramont would count under the Pittston Plan." Appendix 2(67). H. Meade states that she also had conversations with her supervisor, R. McConnell, at the Ramsey Laboratory Complex. According to H. Meade, "[w]e discussed the retirement plan generally, and no one ever questioned that our Paramont time would not count under the Pittston plan." H. Meade further states, "[w]hen I was considering retirement, Jim Campbell told my husband, Rick Meade, . . . to tell me to stay at Pittston until 'I got my 25 years' because my pension benefits would be better than if I retired with 23 years. This meant to me that my 11 years of service with Paramont were being counted under the Pittston plan."

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Don Clark states that, at the Clinch Valley Meeting, "[w]e were told that Paramont time would equal Pittston time under the Pittston retirement plan. We were also told that all of our Paramont time would go over into the Pittston retirement plan." Appendix 2(22). Clark states that Spindler made this representation. Frank L. Farmer, ("F. Farmer"), states that, at the Clinch Valley Meeting, "they told us the years we worked for [Paramont] would be added to our Pittston work to figure our retirement." Appendix 2(33). F. Farmer does not indicate who made this representation. F. Farmer also claims that Quillen made the same representation to him at a meeting "at the back of the Paramont Truck Shop," but he does not remember when this meeting took place.

Jeffrey Petro states that, at the Clinch Valley Meeting, a representation was made that "our retirement would go on with Pittston and that our time with Paramont would count under the Pittston Plan toward our retirement benefits." Appendix 2(83). Petro does not remember the name of the man who made this statement but believes it was a member of management. Petro also states, "at annual safety meetings the question about our retirement benefits would come up and we would be told that our Paramont time counted as Pittston time." Petro does not identify the person who made these statements or when they were made.

James Harry Boone Jr. states that, at the Clinch Valley Meeting, Spindler said, "our time with Paramont would count as Pittston time for our retirement." Appendix 2(8). Boone also alleges that Ratliff told him

that Farrell had asked Quillen what could be done to keep the union out of Paramont and that Quillen told Farrell that the Paramont pension was not very good, to which Farrell responded "we will give them the Pittston pension." Boone does not provide a date for this representation.

William D. Breeding states that, at the Clinch Valley Meeting, Spindler said, "our time with Paramont Mining would continue with Pittston Coal for our retirement benefits." Appendix 2(10). Billy D. Cantrell, ("B. D. Cantrell"), states that both Spindler and Perkins said "that our years of service would be figured in with our Pittston retirement" at the Clinch Valley Meeting. Appendix 2(15). Bennett Lee Cantrell, ("B. L. Cantrell"), states that, at the Clinch Valley Meeting, Spindler and Rhonda Miller said "that my Paramont years would be counted under Pittston's Plan." Appendix 2(14).

Scottie L. Hamilton, ("S. Hamilton"), alleges that, at the Clinch Valley Meeting, Spindler said "that our years of service at Paramont would go toward Pittston retirement benefits." Appendix 2(43). Hamilton also alleges that he received annual benefit statements which "confirmed this."

Edward D. Graham states that, at the Clinch Valley Meeting, Spindler said "that if you had ten years with Paramont, you had ten years with Pittston that would count toward your retirement under the Pittston Plan." Appendix 2(39). Gerald Newton states that, at the Clinch Valley Meeting, Spindler said "if you have ten years of

Paramont service you had ten years of Pittston service." Appendix 2(81).

Jimmy W. Rose states that, Boone told him at Deep Mine # 7 that "my years with Paramont would be treated as time with Pittston for purposes of the retirement plan." Appendix 2(92). Rose does not state when Boone made this statement. Rose also states that, Spindler, Ratliff, Perkins and Quillen made the same representation at the Clinch Valley Meeting. "I was told if I have 10 years with Paramont, I have 10 years with Pittston."

Charles Richardson Jr., ("C. Richardson"), states that, at the Clinch Valley Meeting, Spindler said, "if I had 10 years of service with Paramont, I had 10 years of service with Pittston." Appendix 2(89). C. Richardson also states, "I was also told at safety retraining meetings by Donnie Ratliff, Dennis Rasnick, Wendell Collinsworth, Brooks Addington and Mike Quillen that time with Paramont would count as Pittston time under the Pittston retirement plan. I also attended a meeting at the Esserville truck shop where I was told that my years of service with Paramont would be counted toward [my] Pittston retirement benefit." C. Richardson states that the safety retraining meetings were held every year, but he does not provide a date for the statements made at these meetings.

Hezekiah N. Franklin states that "[i]n approximately 1987 or 1988 Scott Perkins explained to the employees at the Ramsey prep plant . . . that our prior years of

service with Paramont would be credited under the Pittston Plan." Appendix 2(35). Clegg G. Hess states that, at the Clinch Valley Meeting, both Spindler and Quillen stated that "we would get credit for our years at Paramont." Appendix 2(45). Hess also states, "I also remember a meeting at the Paramont training center where Donnie Ratliff gave us several scenarios to show how much better our pension benefits would be under the Pittston Plan and that our Paramont years of service would be included. My supervisor was Brooks Addington and when he retired he told me the reason he was able to retire from a financial standpoint was because of what he would receive under the Pittston retirement formula with his Paramont years of service included."

Willis R. Surrett Jr. states that, at the Clinch Valley Meeting, Spindler said that "all prior time with Paramont Coal would be credited to the Pittston retirement plan." Appendix 2(102). Surrett also states that, during a mine tour in the early 1990s, Perkins said "the new plan would be better than the previous one with all time credited." Surrett further states that, at a dayshift safety break at Deep Mine # 20 in the mid-1990s, Dado said that the "benefit changes would not affect the retirement plan, that it would stay the same."

David P. King states that, at the Clinch Valley Meeting, "[o]ne of the Pittston men, whose name I can't remember, told us that Paramont years of employment would add into Pittston years to figure our retirement benefit." Appendix 2(55).

Rasnick states, "[i]t was represented to me that my entire time of vested service at Paramont Coal Company would count toward my vested service in Pittston Coal Company after Pittston bought us." Appendix 2(86). Rasnick claims that this representation was made by: "Mike Quillen in June of 1986, and for at least the following 12 months; Donald Ratliff, my supervisor, from June of 1986 through July of 1988; Gerald Spindler, in a meeting at [Clinch Valley College] in 1988 or 1989; Eddie Neely, the financial officer in 1987, in the hall, just outside of his office in Esserville. I worked in the Safety Department, we traveled to various mine sites and had safety meetings, picnic, etc. and heard repeatedly these representations made for months by Donnie Ratliff, Mike Quillen, and others."

Oscar Ray Watson states that, at the Clinch Valley Meeting, "Spindler told us the retirement plan with Paramont would be changed to coincide with the Pittston plan." Appendix 2(109). Watson also states, "[l]ater at a yearly training class, . . . Mike Quillen came in and told us that the Parmont plan would be frozen and put into the Pittston plan. He also said this meant better benefits to us and that Pittston would back up and count our time with Paramont as far back as 1977." Watson states that Addington later stopped by the truck shop and told him the same thing.

Jerry Wayne White claims that representations were made to him on several occasions. Appendix 2(113). White states that on one occasion after the acquisition of Paramont, Rasnick and Ratliff spoke to a group of

about 20 to 25 people in the Paramont training room. White states, "I was told that we would have all the same benefits as the Pittston people." White does not identify who made these statements, although it can be inferred that either Rasnick, Ratliff or both made these statements. White also claims that representations that Paramont employees would get the same benefits "as the Pittston people" were "made on an almost daily basis" by Quillen, Ratliff and others. White also states that on one occasion Quillen spoke to a large crowd at the Esserville Shop and told them that they "would get credit for our Paramont time toward a pension figured like the Pittston employees." White states that, during annual retraining in 1986 or 1987, Rasnick told him and others that they would get "credit for our years of service with Paramont figured at the Pittston rate."

Donald Ray Stair states that, at the Clinch Valley Meeting, Spindler said that "Paramont would be added to Pittston Plan so everything would be 100 % vested and years of service plus age would go toward our retirement." Appendix 2(99).

Glenda Brady did not provide any information in her discovery responses regarding any alleged misrepresentations. Appendix 2(9). John Kelly Browning Sr., ("Browning"), Charles Keith Lane, Henry McFadden and Terry Mitchell state that, due to health problems, they can no longer remember any details of any representations made to them about their pension benefits. Appendix 2(12), (56), (65), (70).

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In addition to various oral representations, Rasnick states that, in October 1994, he received a letter from Pittston's Lebanon office informing him that upon his retirement, at age 65, he would receive monthly benefits of approximately $1,300.00. In April 1995, Rasnick received a second letter from the same person at the Lebanon office, informing him that a mistake had been made in calculating his benefits and that the correct amount of his monthly benefits would be $520 per month.

Hayes states that he received annual benefit statements that reflected a projected pension benefit which included his years of service with Paramont. Appendix 2(44). Hayes does not specify when he received these statements. R. Lovell and F. Mullins also allege the receipt of annual benefit statements. Appendix 2(61).

Charles Keith Lane retired in 1993 and began receiving benefits from the Pittston Plan. Appendix 2(56). Danny Ray Taylor began receiving disability retirement benefits in 1991 from the Pittston Plan. Appendix 2(104). Neither Taylor nor Lane has produced any evidence that he was ever paid benefits at a rate, which included his Paramont time prior to 1989 in his Benefit Accrual Service.

Defendants assert that none of the individuals who made these alleged representations were fiduciaries, in that none of them had any discretionary authority over the interpretation of the Pittston Plan or the determination of Plan benefits. In support of this assertion, the defendants have provided the Affidavit of

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Kathy Yeager, (Appendix 3 to Memorandum in Support of Defendants' Second Motion for Summary Judgment) ("Yeager Affidavit"). Yeager is the Human Resources Administrator of Pittston Coal and the custodian of the personnel files of the former employees of Pittston Coal's operating coal companies. Yeager reviewed and summarized the work histories for Addington, Boone, Campbell, Clark, Childress, Collinsworth, Dado, Davis, Dotson, Horton, Jones, McConnell, Miller, Neely, Orender, Perkins, Quillen, Rasnick, Ratliff, Robinette, Spindler and Swiney. Yeager listed the following positions and employers for these individuals for the pertinent time period:

Addington:	General Superintendent, Surface Superintendent and Manager Of Surface Operations, Pyxis;
Boone:	Assistant Superintendent, Deep Mine, and Surface Foreman, Paramont;
Campbell:	Manager of Mines, Ranger Fuel Corp., and General Manager, Elkay Mining Co.;
Childress:	Maintenance Superintendent, Paramont;
Clark:	Engineer, Section Foreman, Assistant Superintendent and Operations Manager, Paramont, and Virginia Underground Operations Manager, Pyxis;

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Collinsworth:	Section Foreman and Safety Analyst, Paramont;
Dado:	General Manager Contract Coal, Pittston Coal Group and Pittston Coal Management Co., and Vice President of Operations, Pyxis;
Davis:	Treasurer, Pittston; Executive Vice President, Pittston Coal Sales; Vice President of Finance, Pyxis;
Dotson:	Surface Foreman, Paramont;
Horton:	Preparation Engineer, Pittston Coal Group, Pittston Coal Management Co. and Pyxis, and Plant Superintendent, Clinchfield Coal Co.;
Jones:	Chief Engineer, Paramont, Pyxis, and Pittston Coal Management Co.;
McConnell:	Foreman, Quality Control Supervisor, Preparation Plant Superintendent and Coal Distribution Supervisor, Paramont and Pyxis;
Neely:	Vice President of Finance, Paramont; Manager of Financial Systems, Pyxis and Pittston Coal Management Co.; and Vice President and Treasurer of Pittston Coal Management Co.;

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Orender:	Superintendent, Paramont;
Miller:	Insurance, Benefits & Public Relations Manager, Paramont and Pyxis;
Perkins:	Project Manager, Operations Manager, Vice President of Operations, Pyxis; and President, Paramont;
Quillen:	Vice President of Operations, President and Chief Executive Officer, Paramont and Pyxis;
Rasnick:	Safety Inspector and Tipple Foreman, Paramont;
Ratliff:	Safety Director, Paramont; and Health & Safety Director and Personnel Manager, Safety & Employee Relations, Pyxis;
Robinette:	Paramont and Pyxis;[3]
Spindler:	Vice President, Pittston; President, Pyxis; and Senior Vice President, Pittston Coal Management Co.;

3. Yeager's affidavit states that the information in Robinette's personnel file is incomplete and does not include the position held.

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Swiney:	Mine Foreman, Assistant Superintendent and Superintendent, Paramont.

In support of the Motion, the defendants also have provided the affidavit of Frank T. Lennon, a member of the Administrative Committee for the Pittston Plan since 1980 (Appendix 4 to Memorandum in Support of Defendants' Second Motion for Summary Judgment) ("Lennon Affidavit"); deposition testimony from Neely; the affidavit of Conley Parsley, the Personnel Manager of Pittston Coal Management Co. in 1995-96; the affidavit of Miller; and a portion of deposition testimony from Miller.

According to Lennon, none of the following persons had any authority to act in any way on behalf of the Pittston Plan: Addington, Boone, Campbell, Clark, Childress, Collinsworth, Dado, Davis, Dotson, Horton, Jones, McConnell, Neely, Orender, Quillen, Rasnick, Spindler and Swiney. Lennon Affidavit at 3. Lennon also states that the following persons had no discretionary responsibility over the Pittston Plan or authority to grant benefits under the Pittston Plan beyond those described in the Plan: Miller, Perkins, Ratliff and Robinette. Lennon Affidavit at 3.

This court previously has heard testimony that Paramont's Director of Human Resources, Robinette, sent a letter to all Paramont employees explaining the changes in their retirement benefits to be effective

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January 1, 1989, ("Robinette's 11-10-88 Letter"). Robinette's 11-10-88 Letter states in part:

> On January 1, we will merge the [Paramount] plans into The Pension-Retirement Plan of The Pittston Company and its subsidiaries. *On that date you will* automatically become a member of The Pittston Plan and *begin to earn pension accruals under The Pittston Plan. When you retire, your pension benefit under this plan will be the combination of what you earned under the Paramont . . . Plan prior to January 1, 1989, and what you earn under the Pittston Plan for service beyond January 1, 1989.*
>
> . . .
>
> *Benefits Accrued Under The Paramont Plan Prior to January 1, 1989*
>
> When you retire, all pension benefits you have accrued under The Paramont Plan up to January 1, 1989, will be determined in accordance with the provisions of The Paramont Plan as in effect on December 31, 1988.

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Benefit Accruals After January 1, 1989

> Your pension benefits accrued from and after January 1, 1989, will be determined in accordance with the provisions of The Pittston Pension Plan. . . .

(Emphasis added.) This letter continues to explain that the Pittston Plan, like the Paramont Plan, then required five years of vesting service. The letter further states that "[a]ll vesting service under The Paramont Plan will also constitute and count as vesting service under The Pittston Plan." Robinette's 11-10-88 Letter also states:

> We all know that pensions are very complicated and technical documents and can be difficult to explain in simple terms. While we have tried hard to explain in simple language how these Plans work, and have written the pension booklet in as relatively clear and simple language as possible, we understand that you may have questions about your pension from time to time. If you have any questions of any kind about your pension under either the Paramont or Pittston Plan, please address your questions in writing to the Human Resources Department.

It is also undisputed that a company newsletter, the Paramont Pride, containing an article identical to Robinette's 11-10-88 Letter, ("the Paramont Pride Article"), was distributed to all Paramont and Pyxis

employees in December 1988. The Paramont Pride Article also stated the following:

> On January 1, we will merge the [Paramont] plans into The Pension-Retirement Plan of The Pittston Company and its Subsidiaries. *On that date you will* automatically become a member of The Pittston Plan and *begin to earn pension accruals under The Pittston Plan. When you retire, your pension benefit under this plan will be the combination of what you earned under the Paramont . . . Plan prior to January 1, 1989, and what you earn under The Pittston Plan for service beyond January 1, 1989.*
>
> . . .
>
> *Benefits Accrued Under The Paramont Plan Prior to January 1, 1989*
>
> When you retire, all pension benefits you have accrued under The Paramont Plan up to January 1, 1989, will be determined in accordance with the provisions of The Paramont Plan as in effect on December 31, 1988.

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Benefit Accruals After January 1, 1989

> Your pension benefits accrued from and after January 1, 1989, will be determined in accordance with the provisions of The Pittston Pension Plan. . . .

(Emphasis added).

Robinette testified that the Paramont Pride was distributed to all Paramont and Pyxis employees. Robinette also testified that, to his knowledge, Quillen reviewed the content of all editions of the Paramont Pride before it was distributed to the employees.

At the time of Pyxis's acquisition of Paramont in 1986, Miller, worked in Paramont's human resources department. In April 1990, Miller served as Paramont's Manager of Employee Benefits and Insurance. This court previously has heard testimony that, in this role, Miller sent a letter to all Paramont employees with a benefit statement for the Paramont Production Incentive Plan, (Exhibit 8) ("Miller's 4-10-90 Letter"). Miller's 4-10-90 Letter states in part:

> Attached you will find your Production Incentive Plan benefit statement for 1989. . . . Please remember this is just one portion of your retirement plan. . . .
>
> You will receive a statement on the other two parts of your pension retirement plan in

early May as well as a sample form showing how your retirement benefit is calculated. These two parts consist of your pension benefit from the Paramont Plan through December 31, 1988 and your pension benefit from the Pittston Plan from January 1, 1989. You will recall that the Paramont Defined Benefit Plan was frozen on December 31, 1988. All vested Paramont employees will receive a fixed amount calculated as of this date upon retirement. Everyone employed beginning January 1, 1989 will also receive a pension-retirement benefit from the Pittston Plan if vested. Employees vested in the Paramont Plan are also vested in the Pittston Plan. . . .

We all realize that pension-retirement plans are not easily understood. We try to provide you with as much information on the plans as possible. A summary plan description booklet which explains the Pittston Pension-Retirement Plan will be available soon and will be mailed to you. In the meantime, if you have specific questions, please do not hesitate to contact the Employee Benefits Department.

Miller also helped prepare and sent a May 15, 1990, letter from Perkins, then the President of Paramont, to all Paramont employees, ("Perkins's 5-15-90 Letter"). Perkins's 5-15-90 Letter further explained the Paramont employees' pension benefits and included a sample benefit calculation for a sample employee who worked

at Paramont both before and after January 1, 1989. The formula used only time worked for Paramont after January 1, 1989, in the calculation of benefits under the Pittston Plan.

Through 1998, the Pittston Plan provided Annual Benefit Statements to each of the Pittston Plan Participants. These Annual Benefit Statements included an estimate of a participant's future Pittston Plan retirement benefit assuming the participant continued to work at a Pittston Plan Participating Company until his Normal Retirement Date (age 65) and elected a single life annuity benefit at that time. Annual Benefit Statements estimated benefits as of January 1 of the year stated on the benefit statement. Annual Benefit Statements also included an estimate of the participant's accrued benefit as of January 1 of the year stated on the benefit statement. This accrued benefit is the benefit that a participant would receive at age 65 if the participant did not earn any additional Benefit Accrual Service after the year reflected in the Annual Benefit Statement.

These Annual Benefit Statements did not indicate how a participant's monthly pension benefit estimate had been calculated. Nor did these Annual Benefits Statements state that Paramont employees' years of service with Paramont prior to January 1, 1989, were included in the calculations of benefits under the Pittston Plan. Each of these Annual Benefits Statements also contained the following:

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> . . . Please remember that the figures shown are only estimates . . . This summary does not determine the benefits you are able to receive. Only the official plan documents and the exact data applicable to you can determine your benefits. In the case of a conflict or omission, the formal plan texts will prevail.

Three of the Remaining Plaintiffs received some Annual Benefit Statements containing incorrect estimates of their future pension benefits. Baird received incorrect Annual Benefit Statements in 1992, 1996-98; Baird received correct Annual Benefit Statements in 1988-91, 1993-95. Brady received incorrect Annual Benefit Statements in 1996-98; Brady received correct Annual Benefit Statements in 1993-95. J. Jones received incorrect Annual Benefit Statements in 1996-98; J. Jones received correct Annual Benefit Statements in 1988-95.

Several of the Remaining Plaintiffs have admitted that they received specific notice regarding the discrepancy in the way their pension benefits were to be calculated. Rasnick received a letter in October 1994 from Pittston informing him that at age 65 he would receive monthly pension benefits of approximately $1,300. In April 1995, Rasnick received a second letter from Pittston stating that the first letter had contained an incorrect calculation of his pension benefits and that the correct amount of his pension benefits at age 65 would be $520 per month.

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On October 19, 1992, Miller sent a letter to an attorney for Franklin correctly explaining his pension benefits. Miller sent another letter on June 22, 1993, to another attorney for Franklin again correctly explaining his pension benefits. On August 24, 1987, F. Farmer received a letter informing him that he was not entitled to any pension benefit from the Pittston Plan and that his only pension came for the Paramont Plans. Browning received a February 26, 1996, letter from the Administrative Committee approving his application for normal retirement benefits in the amount of $453.83 per month. Charles Lane received a January 27, 1994, letter from the Administrative Committee approving his application for late retirement benefits in the amount of $325.20 per month. George Meade received a April 23, 1993, letter from the Administrative Committee approving his application for disability retirement benefits in the amount of $487.92 per month.

Michael Clark, Vernus Culbertson, Scottie Hamilton, Greg Ireson, Ricky Shelton and Gary Swiney each received a statement of their vested retirement benefits that did not include credit for service with Paramont prior to January 1, 1989, when they terminated their employment with Pittston. Clark received a letter dated February 20, 1996, explaining that he had accrued an estimated monthly pension benefit of $1,025.18 as of October 13, 1995, the day he terminated his employment with participating companies under the Pittston Plan. Culbertson received a similar letter dated December 20, 1995, explaining that he had accrued an estimated monthly pension benefit of $388.35 as of April 16, 1995,

the day he terminated his employment with participating companies under the Pittston Plan. Hamilton received a letter dated December 6, 1996, estimating that his vested monthly pension benefit would be $656.33. Ireson received a letter dated December 6, 1996, estimating that his vested monthly pension benefit would be $620.10. Shelton received a letter dated December 19, 1995, explaining that he had accrued an estimated monthly pension benefit of $888.70 as of October 13, 1995, the day he terminated his employment with participating companies under the Pittston Plan. Swiney received a letter dated February 20, 1996, estimating that his vested monthly pension benefit would be $852.12 These estimated monthly benefits did not include any Benefit Accrual Service under the Pittston Plan formula for the employees' time with Paramont prior to January 1, 1989.

Each of the Remaining Plaintiffs received a cover letter dated September 25, 2000, from James Spurlock, Pittston's Vice President of Human Resources, enclosing a September 23, 2000, letter from Robert A. McGregor, Paramont's Vice President, ("McGregor's 9-23-00 Letter").[4] McGregor's 9-23-00 Letter states:

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4. The Remaining Plaintiffs state in their response that it is "undisputed" that each of them received these letters. Remaining Plaintiffs claim that these letters were submitted as Trial Exhibit 18; however, the court's records show that Trial Exhibit 18 was a July 11, 1986, Letter from Quillen. According to the court's records, these letters were contained in Trial Exhibit 45, and Spurlock testified that these letters were sent to all then-current and former Paramont Employees.

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Several employees have come to me with questions related to their benefits under the Pittston Pension-Retirement Plan, the former Paramont Pension Plan and the former Paramont Production Incentive Plan. I have discussed this matter with the people who are responsible for administering these benefits, and I can assure you that the Company takes your concerns seriously. I hope the information included in this letter will help answer any questions and alleviate any concerns you may have.

One question seems to stem from issues related to the merger of the Paramont Pension plans into the Pittston Pension Plan as of January 1, 1989.

. . .

At the time of the merger of these Plans, benefits under the Paramont Pension Plans were frozen and protected under the terms of the Plan based on employees' benefit service with Paramont up to December 31, 1988. Beginning January 1, 1989, any benefit that Paramont employees accrue based on their continued service with Paramont, or with another Pittston company (e.g., Pyxis) that participates in the Pittston Pension Plan, are determined in accordance with the provisions of the Pittston Pension Plan.

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. . .

Some people seem to be confused over the difference between "Benefit Accrual Service" and "vesting service." In general, Benefit Accrual Service is used to determine the amount of the annual retirement benefit to which a participant is entitled under the Pittston Pension Plan. Vesting service is used to determine when a participant has a non-forfeitable right to a benefit under the Plan. Under the Pittston Pension Plan, a participant with five years of vesting service has a non-forfeitable right to 100% of his vested interest in the retirement benefit he has accrued under the terms of the Pittston Pension Plan. For the benefit of the Paramont employees, when the Paramont Pension Plans were merged into the Pittston Pension Plan in 1989, all of an employee's vesting service under the Paramont Pension Plan prior to 1989 was counted for purposes of determining vesting service under the Pittston Pension Plan. For example, if an employee had worked for Paramont for three years prior to January 1, 1989, he would become 100% vested under the Pittston Plan Pension Plan after earning only an additional two years of vesting service. As clarified above, when the Pension Plans were merged, Paramont employees began accruing Benefit Accrual Service under the Pittston Pension Plan for service beginning January 1, 1989.

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The Remaining Plaintiffs assert that as a result of the defendants' alleged breach of fiduciary duties, they did not vote to unionize, work for another company or save more money for retirement.

Analysis

With regard to a motion for summary judgment, the standard for review is well-settled. The court should grant summary judgment only when the pleadings, responses to discovery and the record reveal that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Miller v. Leathers,* 913 F.2d 1085, 1087 (4th Cir.1990) (en banc), *cert. denied,* 498 U.S. 1109, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991); *Ross v. Communications Satellite Corp.,* 759 F.2d 355, 364 (4th Cir.1985). A genuine issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505.

In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson,* 477 U.S. at 255, 106 S.Ct. 2505; *Matsushita,* 475 U.S. at 587, 106

S.Ct. 1348; *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir.1995); *Miltier v. Beorn*, 896 F.2d 848, 850 (4th Cir.1990); *Ross*, 759 F.2d at 364; *Cole v. Cole*, 633 F.2d 1083, 1092 (4th Cir.1980). In other words, the nonmoving party is entitled to have " 'the credibility of his evidence as forecast assumed.' " *Miller*, 913 F.2d at 1087 (quoting *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir.1979)). Therefore, in reviewing the Motion in this case, the court must view the facts and inferences in the light most favorable to the Remaining Plaintiffs.

When faced with a motion for summary judgment, however, a plaintiff cannot simply rely on the allegations contained in his pleadings. For a plaintiff's claim to survive a motion for summary judgment, "there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505. In this case, the Remaining Plaintiffs rely on their responses to the defendants' interrogatories and the evidence produced at the trial of the Initial Plaintiffs' claims in an effort to survive the Motion.

As stated above, the only claim remaining before the court is the plaintiffs' claim that the defendants breached their fiduciary duties by providing plaintiffs inaccurate and untruthful information about the inclusion of their years of service with Paramont prior to January 1, 1989, in the Benefit Accrual Service used to calculate a *549 portion of their retirement benefits under the Pittston

Plan. Plaintiffs bring this claim under ERISA § 502(a)(3), which provides:

> A civil action may be brought—
>
> (3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C.A. § 1132(a)(3) (West 1999). This court previously has held that, to establish a claim for breach of fiduciary duty under ERISA § 502(3)(a), the plaintiffs in this case must show: 1) that a defendant was a fiduciary of the ERISA plan; 2) that a defendant breached its fiduciary responsibilities under the plan; and 3) that the participant is in need of injunctive or "other appropriate equitable relief" to remedy the breach. *See Adams*, Civ. No. 2:02cv00044, Docket Item No. 169 (citing *Blair v. Young Phillips Corp.*, 235 F.Supp.2d 465, 470 (M.D.N.C.2002) (citing *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 379-80 (4th Cir.2001))).[5] This court further recognized that misrepresentations, whether intentional or not, would violate a fiduciary's duty not to misinform plan

5. For brevity's sake, the court will not repeat here the legal analysis of the applicable case law contained in its earlier Findings Of Fact And Conclusions Of Law. This analysis, however, is incorporated by reference as if set forth fully in this Memorandum Opinion.

beneficiaries. *See Adams*, Civ. No. 2:02cv00044, Docket Item No. 169 (citing *Varity v. Howe*, 516 U.S. 489, 506, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996); *Griggs*, 237 F.3d at 380-84.)

The defendants in this case have never contested the assertion that they were fiduciaries of the ERISA plan at issue. Instead, the defendants argue that summary judgment should be entered in their favor on the Remaining Plaintiffs' breach of fiduciary duty claims because there is no genuine issue of material fact, and they are entitled to judgment as a matter of law. In particular, the defendants argue that there was no breach of fiduciary duty in that there were no misrepresentations made to the Remaining Plaintiffs and, furthermore, that the alleged representations were made by persons who were not acting in a fiduciary capacity. The defendants further assert that they are entitled to summary judgment in that the claims of the Remaining Plaintiffs are barred by the statute of limitations. The court will address each of these issues in turn, starting with the issue of whether anyone provided the Remaining Plaintiffs with inaccurate and untruthful information concerning their benefits under the Pittston Plan.

Throughout this case, the plaintiffs have represented to the court that they were told on numerous occasions by different Pittston representatives that they would receive credit for their years of service with Paramont prior to January 1, 1989, in the Benefit Accrual Service used to calculate a portion of their benefits under the

Pittston Plan. After hearing the evidence at trial, however, the court held that no misrepresentation had been made to any of the Initial Plaintiffs. A review of the evidence now before the court shows a lack of evidence of any misrepresentation made to any of the Remaining Plaintiffs, other than K. Sluss, Adkins, J. White, Hess and Shelton.

The Remaining Plaintiffs have offered evidence regarding a number of oral representations, including statements that the employees' time with Paramont would be counted for vesting purposes under the Pittston Plan, the employees would not lose any benefits when the plans merged and that their time with Paramont would be "figured in," "added to," "included," "credited," "absorbed," "counted," "count in calculating" or "counted together." Evidence also has been offered that some of the Remaining Plaintiffs were told that their time with Paramont would "carry over," "go over," "roll over," or "merge." Another Remaining Plaintiff has stated that he was told that the "years we worked for Paramont would be added to our Pittston work." Several Remaining Plaintiffs assert that the defendants represented that their time with Paramont would equal, count as or be recognized as Pittston time.

Whether these statements were made or not, of course presents an issue of fact. This issue of fact is not material, however, in that I find that none of these statements is a misrepresentation, in that none of these statements contains false information about the Remaining Plaintiffs' rights under the Pittston Plan.

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It is important to note that none of the Remaining Plaintiffs has produced any evidence that anyone told them specifically that their time with Paramont would be included in their Benefit Accrual Service used in calculating a portion of their retirement benefits under the Pittston Plan. Under the terms of the Pittston Plan, the Remaining Plaintiffs' time with Paramont, prior to January 1, 1989, is counted for vesting purposes. Also, the Remaining Plaintiffs did not lose any benefits when the plans merged. Furthermore, general statements that the Remaining Plaintiffs' time with Paramont would be "figured in," "added to," "included," "credited," "absorbed," "counted together," "carry over," "go over," "roll over," "counted," or would "count in calculating," or "merge" for purposes of calculating their benefits under the Pittston Plan do not contain false information. Under the Pittston Plan, the Paramont employees are given credit for their time with Paramont in calculating benefits under the plan. Under the terms of the Pittston Plan, the amount of monthly retirement benefits payable to a former Paramont employee depends on both the amount of time employed by Paramont prior to January 1, 1989, and the amount of time employed by a Participating Company after January 1, 1989.

Only five of the Remaining Plaintiffs have provided evidence of statements that do contain false information. Sluss has stated that Spindler, Farrell, Ratliff, Clark and Quillen made statements that his time with Paramont "would count for all purposes in the Pittston Plan." Adkins has stated that Spindler said "our Paramont years of service would count as Pittston time in

calculating pension benefits." J. White has stated that Quillen said that Paramont employees "would get credit for our Paramont time toward a pension figured like the Pittston employees." J. White also has said that Rasnick said that Paramont employees would "credit for our years of service with Paramont figured at the Pittston rate." Hess has said that Ratliff actually provided him with calculations of his retirement benefits under the Pittston Plan that included his years with Paramont prior to January 1, 1989. Shelton has said Ratliff and Miller also provided calculations of retirement benefits under the Pittston Plan that included years of service with Paramont prior to January 1, 1989, in the calculation of those benefits.

I find that each of these statements, if made, contains false representation. In particular, time spent working for Paramont prior to January 1, 1989, does not count "for all purposes" in the Pittston Plan. Also, all years spent working for Paramont do not count the same as time spent working for Pittston in the calculation of benefits under the Pittston Plan. Former Paramont employees' pensions are not "figured like the Pittston employees," nor do they get credit for all years of *551 service with Paramont "figured at the Pittston rate" under the Pittston Plan. Finally, if anyone performed calculations of estimated pension benefits, including time for service with Paramont prior to January 1, 1989, in

the Benefit Accrual Service, this was inaccurate under the terms of the Pittston Plan.[6]

That being the case, the court will now turn to the issue of whether any of the individuals whom the plaintiffs claim made these misrepresentation were acting in a fiduciary capacity in doing so. As the Fourth Circuit recognized in *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 60-61 (4th Cir.1992), "[b]efore one can conclude that a fiduciary duty has been violated, it must be established that the party charged with the breach meets the statutory definition of 'fiduciary.' "

ERISA § 3(21)(A) defines a "fiduciary" as:

> . . . a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets. . . .

29 U.S.C.A. § 1002(21)(A) (West 1999). The Fourth Circuit in *Coleman* further held that the inclusion of the

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6. Neither Hess nor Shelton has produced any evidence that specifically states that they were provided pension calculations that included their years of service with Paramont prior to January 1, 1989, in the Benefit Accrual Service used to calculate their estimated pension benefits. Nevertheless, at this stage of the proceedings, the court has given these Remaining Plaintiffs the benefit of this inference.

phrase "to the extent" in the statutory definition means that "a party is a fiduciary only as to the activities which bring the person within the definition.... In other words, a court must ask whether a person is a fiduciary with respect to the particular activity at issue." *Coleman*, 969 F.2d at 61.

The court further recognized that discretionary authority or responsibility is pivotal to the statutory definition of "fiduciary." *Coleman*, 969 F.2d at 61. As the District Court for the Eastern District of Virginia has stated,

> In other words, a fiduciary within the meaning of ERISA 'must be someone acting in the capacity of manager, administrator, or financial adviser to a plan.' . . . To determine whether a person is subject to ERISA fiduciary duties, the court must determine the extent to which that person exercises discretionary authority, control or responsibility with respect to management or administration of the plan.

Sentara Va. Beach Gen. Hosp. v. LeBeau, 182 F.Supp.2d 518, 523 (E.D.Va.2002). Furthermore, performing administrative acts such as answering employees' inquiries or processing claim forms does not amount to discretionary functions, which would qualify a person as a fiduciary under ERISA. *See Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 455 (6th Cir.1991) (a claims processor who had only the power to pay out benefits according to the

terms of the established plan was not an ERISA fiduciary); *Weeks v. West. Auto Supply Co.*, No. Civ. A. 7:02cv00724, 2003 WL 21510822 at *6-7, (W.D.Va. June 25, 2003) (performing ministerial, administrative functions such as providing written materials and answering questions are not exercising discretionary authority); *Hansen v. N. Trident Reg'l Hosp., Inc.*, 60 F.Supp.2d 523, 527-28 (D.S.C.1999) (handling the processing of benefit applications, claims and related paperwork were not discretionary functions); *see also* *552 *Fitch v. Chase Manhattan Bank, N.A.*, 64 F.Supp.2d 212, 229 (W.D.N.Y.1999) (preparation and issuance of annual benefit statements not a fiduciary activity).

In order to determine whether a party possessed the discretionary authority or responsibility necessary to be a fiduciary, courts first should look to the language of the plan documents themselves and, then, should look to the party's actions to determine if the party, in fact, exercised discretionary authority. *See Coleman*, 969 F.2d at 61; *see also Phelps v. C.T. Enters., Inc.*, 394 F.3d 213, 221-222 (4th Cir.2005) (when a party voluntarily assumes responsibility of a fiduciary, the party becomes subject to the obligations of a fiduciary under ERISA).

The defendants in this case contend that no misrepresentations occurred and, further, if they did, that they were not made by a person acting in a fiduciary capacity, and, thus, could not be the basis of a breach of fiduciary duty claim. Based on the evidence before the court, I find no genuine issue of material fact in that none of the individuals who the plaintiffs allege made

misrepresentations, other than Joseph Farrell, possessed any discretionary authority to alter the terms of the Pittston Plan or to determine eligibility for benefits or the amount of benefits a participant was entitled to under the Pittston Plan. This court previously has held that Quillen, Fox, Spindler, Robinette, Miller and Neely possessed no discretionary authority to determine eligibility for benefits or the amount of benefits to which a participant was entitled. The plaintiffs have produced no new evidence to the contrary. Also, there is no evidence that any of the remaining individuals, other than Farrell, performed any functions, administrative or otherwise, with regard to the Pittston Plan.

Two of the Remaining Plaintiffs, Bobby Wheeler and Sluss, claim that misrepresentations were made to them by Farrell, Pittston's Senior or Executive Vice President. The defendants concede that Farrell became Chairman of Pittston's Board of Directors and Chief Executive Office of Pittston in 1991. The defendants further concede that the Board of Directors is a fiduciary of the Pittston Plan and that, if Farrell were speaking on behalf of the Board of Directors, Farrell could act as a fiduciary. Wheeler claims that either Spindler or Farrell stated that "all time with Paramont would roll-over into the Pittston retirement plan and that the Pittston retirement plan was better than the Paramont plan." Again, this statement is not a misrepresentation. Therefore, it cannot be the basis for a breach of fiduciary duty claim regardless of whether it was made by a person acting in a fiduciary capacity. Sluss claims that Farrell stated that

his Paramont time "would be counted for all purposes in the Pittston Plan." As held above, this statement does contain false information, in that, under the Pittston Plan, Paramont employees' time working for Paramont prior to January 1, 1989, is not counted as Benefit Accrual Service time. Also, this false statement was made by a person who was a fiduciary of the Pittston Plan. Sluss has not, however, provided the court with any evidence as to the facts and circumstances or date of Farrell's misrepresentation.

Since the Remaining Plaintiffs have provided evidence of at least one misrepresentation made by a fiduciary, the court must address the defendants' argument that the Remaining Plaintiffs' breach of fiduciary duty claims are barred by ERISA's statute of limitations. *See* 29 U.S.C.A. § 1113 (West 1999).

Section 1113 provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C.A. § 1113 (West 1999).

Section 1113 provides a statute of limitations of the earlier of six years from the date of the last action constituting a breach or three years from the date on which the plaintiff had knowledge of the breach. Section 1113 also provides, however, that in cases of "fraud or concealment," a breach of fiduciary duty claim may be commenced within six years of discovery of the breach. At least one circuit court has held this six-year statute of limitations is not limited to only those cases of fraudulent concealment, but rather applies to breach of fiduciary duty claims based on misrepresentations where the defendant engaged in acts which hindered the plaintiff's discovery of the breach. *See Caputo v. Pfizer, Inc.*, 267 F.3d 181, 188-90 (2nd Cir.2001). On the other hand, a claim of fraudulent concealment only succeeds where a plaintiff, despite reasonable diligence, has no notice of a fiduciary's wrongdoing. *See J. Geils Band Employee Ben. Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1255 (1st Cir.1996), *cert. denied*, 519 U.S. 823, 117 S.Ct. 81, 136 L.Ed.2d 39 (1996). Where a breach of fiduciary duty is alleged without fraud, actual

knowledge on the part of the plaintiff of the defendant's breach brings his claim under the three-year statute of limitation of § 1113. *Davis v. Bowman Apple Prods., Co., Inc.*, No. Civ. A. 5:00cv00033, 2002 WL 535068 at *8 (W.D.Va. March 29, 2002). Actual knowledge is defined as "actual knowledge of all material facts necessary to understand that some claim exists." *Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859 (8th Cir.1999) (citing *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1177 (3d Cir.1992)).

The plaintiffs filed this case in the Eastern District of Tennessee on December 19, 2001. Therefore, even assuming the application of the six-year statute of limitations, the Remaining Plaintiffs' causes of action must have accrued on or after December 19, 1995, to survive the Motion. As stated above, the Remaining Plaintiffs' breach of fiduciary duty claim is based on alleged misrepresentations. The majority of the Remaining Plaintiffs have identified the mid-to late 1980s or the date of the company-wide meeting held at Clinch Valley College in January 1990 as the time period of the alleged misrepresentations. No Remaining Plaintiff has identified any misrepresentation occurring more recent than the mid-1990s. Fifty-three Remaining Plaintiffs did not identify a date for at least one of the misrepresentations they allegedly heard; 15 of those Remaining Plaintiffs, however, identified speakers who left employment with Pittston prior to December 19, 1995. Specifically, Sluss has not provided evidence of the date on which he claims that Farrell said that his Paramont time "would be counted for all purposes in the Pittston Plan."

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The defendants argue that the Remaining Plaintiffs claims also are barred because they were filed more than three years after they received actual knowledge of their claims. In particular, the defendants argue that the Remaining Plaintiffs received actual knowledge of their breach of fiduciary duty claims when they received the four accurate written communications explaining their pension benefits, the most recent of which was sent in the spring of 1990. Defendants argue that if these written communications differed from the alleged oral representations made to the Remaining Plaintiffs, then they had actual knowledge that either the written communications or the oral representations were wrong. Defendants also argue that the claims of certain of the Remaining Plaintiffs whose unique circumstances establish that they had actual knowledge of their claims more than three years prior to filing this action are barred by the three-year limitations period.

Remaining Plaintiffs argue that their claims are not barred by the statute of limitations. In particular, the Remaining Plaintiffs argue that the "fraud or concealment" exception should apply to this case. They further argue that they did not discover a breach of fiduciary duty had occurred until they received McGregor's 9-23-00 Letter explaining that their time with Paramont prior to January 1, 1989, would not be included in their Benefit Accrual Service. They further argue that, even if the "fraud or concealment" exception should not apply, the last action constituting the breach of fiduciary duty was McGregory's 9-23-00 Letter stating that the Remaining Plaintiffs' Benefit Accrual Service

would not include their time with Paramont prior to January 1, 1989.

Unlike with Addington, I find that there has been no evidence proffered by any of the Remaining Plaintiffs from which the court could find that the "fraud or concealment" exception's six-year discovery statute of limitations should apply. Specifically, the Remaining Plaintiffs have not provided any evidence that the defendants engaged in any acts which hindered the Remaining Plaintiffs' discovery of the alleged breach. To the contrary, the undisputed evidence shows that between 1988 and 1990 four separate communications were sent to all Paramont employees, each of which accurately stated that employees would not begin to earn pension accruals under the Pittston Plan until January 1, 1989.

The uncontradicted evidence shows that, in the fall of 1988, prior to the merger of the Paramont Plans into the Pittston Plan, every then-current employee of Paramont received notice on at least two occasions that they would not receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of their retirement benefits under the Pittston Plan. These notices came in the form of Robinette's 11-10-88 Letter and the Paramont Pride Article. Two other accurate communications also were distributed to Paramont employees after the merger of the Paramont Plans into the Pittston Plan on January 1, 1989. Miller's 4-10-90 Letter was distributed to all Paramont employees. Miller's 4-10-90 Letter states that Paramont

employees' pension benefits consisted of two parts, "your pension benefits from the Paramont Plan through December 31, 1988, and your pension benefit from the Pittston Plan from January 1, 1989." Perkins's 5-15-90 Letter also was distributed to all Paramont employees. Attached to Perkins's 5-15-90 Letter was a sample pension benefits calculation. This sample calculation used a hypothetical individual who had 14 years prior service with Paramont and eight years service under the Pittston Plan. The sample did not include the employee's time with Paramont in the calculation of benefits under the Pittston Plan, but instead used only the eight years of service under the Pittston Plan.

As stated above, a claim of fraudulent concealment only succeeds where a plaintiff has no notice of a fiduciary's wrongdoing. Here the accurate communications transmitted in 1988 and 1990 gave the Remaining Plaintiffs notice of a potential breach of fiduciary duty in that, based on their claims, they were receiving inconsistent information concerning how their pension benefits would be calculated. Thus, I find that the "fraud and concealment" exception should not apply to the Remaining Plaintiffs' claims.

That being the case, the court must decide whether the defendants are entitled to judgment as a matter of law because the Remaining Plaintiffs did not file their claims within the earlier of six years after the date of the last action which constituted the breach or within three years after the earliest date on which the Remaining Plaintiffs had actual knowledge of the breach.

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The Remaining Plaintiffs mistakenly claim that the last action that constituted the breach of fiduciary duty was McGregor's 9-23-00 Letter notifying them that they would not receive Benefit Accrual Service credit under the Pittston Plan for their years of service with Paramont prior to January 1, 1989. The Remaining Plaintiffs, however, base their breach of fiduciary duty claims on various "misrepresentations" which they claim were made to them regarding how their pension benefits would be calculated. McGregor's 9-23-00 Letter contains no misrepresentation. The undisputed evidence shows that the alleged misrepresentations on which the Remaining Plaintiffs base their claims occurred no later than the "mid-90s." In particular, none of the Remaining Plaintiffs have produced any evidence that any of these misrepresentations occurred on or after December 19, 1995. Specifically, the one Remaining Plaintiff who has provided evidence of a misrepresentation by a fiduciary, Sluss, has provided no evidence of the date of this representation. Furthermore, the uncontradicted evidence shows that four separate communications were sent to each of the Remaining Plaintiffs between 1988 and 1990 accurately stating that the Remaining Plaintiffs would not receive Benefit Accrual Service for their time with Paramont prior to January 1, 1989. For any Remaining Plaintiff who claims he received misrepresentations before these communications, these communications should have put him on notice that there had been previous misrepresentations. For any Remaining Plaintiff who claims he received misrepresentations after the date of these accurate communications, the misrepresentations conflicting with

this information should have put him on notice that there had been a misrepresentation. Thus, each Remaining Plaintiff had actual notice of a breach no later than the mid-1990s. That being the case, I find that there is no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law because the Remaining Plaintiffs' breach of fiduciary duty claims are barred by the statute of limitations in that they were not filed within three years of this notice.

The Remaining Plaintiffs also argue that they had no notice of any breach of fiduciary duty until they received McGregor's 9-23-00 Letter. It is important to note, however, that much of the language of McGregor's 9-23-00 Letter is very similar to Robinette's 11-10-88 Letter and the Paramont Pride Article. In particular, Robinette's 11-10-88 Letter and the Paramont Pride Article stated: "[O]n January 1 . . . you will . . . begin to earn pension accruals under The Pittston Plan. . . . Your pension benefits accrued from and after January 1, 1989, will be determined in accordance with the provisions of The Pittston Pension Plan. . . ." McGregor's 9-23-00 Letter states: "Beginning January 1, 1989, any benefit that Paramont employees accrue based on their continued service with Paramont, or with another Pittston company . . . are determined in accordance with the provisions of the Pittston Pension Plan. . . . Paramont employees began accruing Benefit Accural Service under the Pittston Pension Plan for service beginning January 1, 1989." Therefore, if, as the Remaining Plaintiffs argue, McGregor's 9-23-00 Letter put them on notice of prior misrepresentations, Robinette's 11-10-88 Letter and The Paramont Pride Article also should have done so.

The plaintiffs also have repeatedly argued that they are entitled to equitable relief in this case because the defendants' actions were similar to those found to be a breach of fiduciary duty by the Supreme Court in *Varity*. The disputed evidence before the court, however, shows that the facts of this case are not similar to those in *Varity*. In *Varity*, the evidence showed that a plan administrator, who was also the employer, purposefully and intentionally deceived a group of beneficiaries to persuade them into voluntarily withdrawing from their financially sound employee benefit plan and transferring to another employer and benefit plan which were insolvent from their inception. *Varity*, 516 U.S. at 493-94, 116 S.Ct. 1065. In the end, these beneficiaries lost all nonpension benefits as a result of this transfer.

The undisputed evidence in this case shows that Paramont's employees did not have a choice of whether to remain under the Paramont Plan or to transfer to the Pittston Plan. The plans were merged effective January 1, 1989. The undisputed evidence also shows that the Pittston Plan provided better benefits than the $250 a month maximum pension benefit available under the Paramont Plan. As a matter of fact, none of the plaintiffs in this case have attempted to argue that their pension benefits are less under the Pittston Plan than they would have been entitled to under the Paramont Plan. Furthermore, none of the plaintiffs have sought reinstatement of benefits under the Paramont Plan. Instead, the plaintiffs argue that their benefits under the Pittston Plan are not as good as they *thought* they

would be. As I have stated before in this case, I cannot find many of Pittston's actions laudable. Nonetheless, I find that the facts of this case are a far cry from the facts of *Varity*.

IV. CONCLUSION

Based on the above, the court will grant the Motion and enter summary judgment in favor of the defendants.

An appropriate order will be entered.

ENTER: March 17, 2006.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, BIG STONE GAP DIVISION DATED JUNE 3, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA BIG STONE GAP DIVISION

Case No. 2:02cv00044

JIMMY ADAMS, *et al.*,

Plaintiffs,

v.

THE BRINK'S COMPANY, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By: Pamela Meade Sargent,
United States Magistrate Judge

This case involves the claims of 123 plaintiffs against their current or former employer, Paramont Coal Corporation, ("Paramont"), its current parent company, the Brink's Company, ("Brink's"), the Brink's Company Pension-Retirement Plan, ("the Brink's Plan"), and the Administrative Committee for Brink's Company

Pension-Retirement Plan, ("the Administrative Committee"). The plaintiffs seek declaratory and equitable relief as well as damages under various claims related to the administration of the Brink's Plan. Jurisdiction over this matter is based upon federal question jurisdiction, *see* 28 U.S.C. § 1331, under the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001 *et seq.* The case is before the undersigned magistrate judge by consent of the parties pursuant to 28 U.S.C. § 636(c)(1).

Plaintiffs originally filed their Complaint in the United States District Court for the Eastern District of Tennessee on December 19, 2001. The Complaint sought recovery based on claims alleging breach of contract, estoppel, the creation of an informal plan, the reduction of accrued benefits and breach of fiduciary duty. In response, the defendants filed a motion to dismiss for failure to exhaust administrative remedies and a motion to dismiss based upon improper venue, or, in the alternative, to transfer venue to the Western District of Virginia. The court denied both motions to dismiss, but granted the defendants' motion to transfer.

Defendants filed their Answer to the Complaint in the Western District of Virginia on April 4, 2002. (Docket Item No. 23.) On September 6, 2002, the defendants filed a Motion For Summary Judgment seeking dismissal as a matter of law of all plaintiffs' claims. (Docket Item No. 36.) By Memorandum Opinion and Order entered November 18, 2003, the court granted in part and denied in part the defendants' Motion For Summary Judgment.

(Docket Item No. 85.) As a result, the court granted summary judgment in favor of the defendants on the plaintiffs' claims alleging breach of contract, estoppel, the creation of an informal plan and the reduction of accrued benefits. The court denied the defendants' Motion For Summary Judgment on the plaintiffs' claims alleging breach of fiduciary duty.

By agreed order entered August 20, 2004, the parties consented to the transfer of this case to the undersigned magistrate judge. (Docket Item No. 108.) By agreed order entered October 7, 2004, the parties agreed to sever the claims of five of the 123 plaintiffs to be tried to the court first. (Docket Item No. 112.) The remaining breach of fiduciary claims of those five plaintiffs, Christopher Brooks Addington, Jack Blanton, Alton Lawson Jr., Ricky D. Meade and Donald Ratliff, were tried to the court February 22 to March 1, 2005. Based on the evidence presented, the court now issues its formal findings of fact and conclusions of law.

I. SUMMARY OF EVIDENCE

At trial, the parties submitted a number of stipulated facts to the court. The parties stipulate that The Pittston Company, ("Pittston"), changed its name to The Brink's Company, and the Pension-Retirement Plan of The Pittston Company and its Subsidiaries changed its name to The Brink's Company Pension-Retirement Plan in 2003. The parties agree, therefore, that any references to "Pittston" and "Brink's" would be interchangeable and

would refer to The Brink's Company. The parties further agree that any references to the "Brink's Plan" or the "Pittston Plan" would be interchangeable and would refer to the Brink's Company Pension-Retirement Plan.

The parties agree that Pyxis Resources, ("Pyxis"), then a subsidiary of Pittston, acquired Paramont on July 7, 1986, and that Pyxis was a Participating Company in the Pittston Plan since before January 1, 1988. The parties further agree that, at the time of its acquisition by Pyxis, Paramont's employees all were participants in one of two identical defined-benefit pension plans, the Salaried Employees' Pension Plan of Paramont Coal Corporation or the Hourly Employees' Pension Plan of Paramont Coal Corporation, (Exhibits 105 and 106 respectively) (collectively, "the Paramont Plans"). The Paramont Plans did not require any employee contributions and provided a maximum monthly retirement benefit of $350 for 20 years of service with Paramont. Under the Paramont Plans, all Paramont employees, regardless of their salary, earned the same retirement benefit for the same years of service.

The parties have stipulated that Exhibits 496 to 505 contain complete and authentic copies of the Pittston Plan in effect as of the dates indicated. The Pittston Plan also is a defined-benefit plan. Under the Pittston Plan, a Participant's retirement benefits are calculated based on multiplying a percentage of an Average Salary by the number of years of "Benefit Accrual Service." Section 4.04 of the December 11, 1987, and the January 1, 1989, Plans, (Exhibits 499 and 500, respectively), states: "

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Service Prior to Participation. The Board [of Directors] shall determine to what extent Benefit Accrual Service shall be credited to any Participant for service for any Subsidiary or Division prior to the date such Subsidiary or Division became a Company."

On September 9, 1988, Pittston's Board of Directors amended the 1987 Plan to allow the Administrative Committee to adopt amendments to the Plan. On November 18, 1988, the Administrative Committee amended the 1987 Plan to add Exhibit G. Exhibit G merged the Paramont Plans into the Pittston Plan effective January 1, 1989. Exhibit G is entitled " *Special Provisions Applicable to Former Participants in the Pension Plans of Paramont Coal Corporation.*" The initial paragraph of Exhibit G states: "In connection with such mergers, the provisions of this Exhibit G shall apply, effective January 1, 1989, notwithstanding any provisions elsewhere in the Plan to the contrary." Exhibit G further states in part:

> (ii) The accrued pension benefit of each Paramont Participant under the Plan in respect of periods of service prior to January 1, 1989 shall be determined solely in accordance with the provisions of the Paramont Plan in which he was a Participant, as in effect immediately prior to January 1, 1989, based solely on his "Benefit Service" (as defined in such Paramont Plan) on December 31, 1988 or any earlier date on which the Paramont Participant ceases to be an employee of Paramont Coal Corporation. . . .

> (iii) The accrued pension benefit of each Paramont Participant in respect of periods of service as an employee of Paramont from and after January 1, 1989 . . . shall be determined solely in accordance with the provisions of the Plan. . . .

This court previously found that the language of Exhibit G is clear and unambiguous and does not provide for the inclusion of plaintiffs' years of service with Paramont prior to January 1, 1989, in the calculation of their retirement benefits under the Pittston Plan. *See Adams v. The Pittston Company,* Civ. No. 2:02cv00044, Docket Item No. 80 (W.D.Va. July 28, 2003) (Report and Recommendation), Docket Item No. 85 (W.D.Va. Nov. 18, 2003) (Order adopting Report and Recommendation) and Docket Item No. 130 (W.D.Va. Jan. 18, 2005) (Memorandum Opinion on Plaintiffs' Motion for Reconsideration).

The parties agree that, as of December 11, 1987, the Pittston Plan provided a single life annuity normal retirement pension benefit equal to the sum of 2.1 percent of the employee's Average Salary multiplied by his number of years of Benefit Accrual Service not to exceed 25 plus 1 percent of his Average Salary multiplied by his number of years of Benefit Accrual Service in excess of 25 less 1.25 percent of his Social Security Benefit multiplied by his number of years of Benefit Accrual Service not to exceed 40, ("Pittston Plan Old Formula"). In other words, a single life annuity at normal retirement under the Pittston Plan Old Formula =

(.021)(FAE)(BAS up to 25) + (.01)(FAE)(BAS over 25)-(.0125)(SS)(BAS up to 40) where FAE = Average Salary, BAS = Benefit Accrual Service and SS = Social Security Benefits.

The parties also agree that, as of March 7, 1990, the Pittston Plan provided a single life annuity normal retirement pension benefit equal to the sum of 2.1 percent of the employee's Average Salary multiplied by his number of years of Benefit Accrual Service not to exceed 25 plus 1 percent of his Average Salary multiplied by his number of years of Benefit Accrual Service in excess of 25 less .55 percent of his Covered Compensation Base (up to his Final Covered Compensation) multiplied by the number of years of Benefit Accrual Service (including fractions thereof) not to exceed 35, ("Pittston Plan New Formula"). In other words, a single life annuity at normal retirement under the Pittston Plan New Formula = (.021)(FAE)(BAS up to 25) + (.01)(FAE)(BAS over 25)-(.0055)(CCB up to FCC)(BAS up to 35) where FAE = Average Salary, BAS = Benefit Accrual Service, CCB = Covered Compensation Base and FCC = Final Covered Compensation.

Through 1998, the Pittston Plan provided Annual Benefit Statements to each of the Pittston Plan Participants. These Annual Benefit Statements included an estimate of a participant's future Pittston Plan retirement benefit assuming the participant continued to work at a Pittston Plan Participating Company until his Normal Retirement Date (age 65) and elected a single

life annuity benefit at that time. Annual Benefit Statements estimated benefits as of January 1 of the year stated on the benefit statement. Annual Benefit Statements also included an estimate of the participant's accrued benefit as of January 1 of the year stated on the benefit statement. This accrued benefit is the benefit that a participant would receive at age 65 if the participant did not earn any additional Benefit Accrual Service after the year reflected in the Annual Benefit Statement.

The parties agree that Paramont hired Christopher Brooks Addington, ("Addington"), on April 1, 1976, and that he was an employee of Paramont on July 7, 1986, the date it was acquired by Pyxis. As of January 1, 1989, Addington was entitled to receive monthly retirement benefits of $223.13 under the Paramont Plans. Addington retired from Pyxis on December 30, 1994. Addington's Normal Retirement Date was November 1, 1997. There are 8.8333 years of Benefit Accrual Service between January 1, 1989, and November 1, 1997. There are six years of Benefit Accrual Service from January 1, 1989, to December 30, 1994. From April 1, 1976, to December 30, 1994, there are 19 years of service.

In 1991, Addington's estimated Average Salary was $64,260.50, and his estimated Covered Compensation Base was $28,200. Using Addington's 1991 estimated Average Salary of $64,260.50, his estimated Covered Compensation Base of $28,200 and 8.8333 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $879.18 per month. Addington's 1991

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Annual Benefit Statement estimated his future monthly retirement benefits as $1,102. The benefit estimate printed on Addington's 1991 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Addington's 1991 Annual Benefit Statement estimated that Addington's accrued monthly benefits as of January 1, 1991, was $422.

In 1992, Addington's estimated Average Salary was $67,210, and his estimated Covered Compensation Base was $28,200. Using Addington's 1992 estimated Average Salary of $67,210, his estimated Covered Compensation Base of $28,200 and 8.8333 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $924.78 per month. Addington's 1992 Annual Benefit Statement estimated his future monthly retirement benefits as $223 from the Paramont Plans and $924 from the Pittston Plan. The benefit estimate printed on Addington's 1992 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Addington's 1992 Annual Benefit Statement estimated that Addington's accrued monthly benefits as of January 1, 1992, was $527.

In 1993, Addington's estimated Average Salary was $70,564, and his estimated Covered Compensation Base was $28,200. Using Addington's 1993 estimated Average Salary of $70,564, his estimated Covered Compensation Base of $28,200 and 8.8333 years of Benefit Accrual Service, the Pittston Plan New Formula produces a

result of $976.63 per month. Addington's 1993 Annual Benefit Statement estimated his future monthly retirement benefits as $223 from the Paramont Plans and $976 from the Pittston Plan. The benefit estimate printed on Addington's 1993 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit statement. Addington's 1993 Annual Benefit Statement estimated that Addington's accrued monthly benefits as of January 1, 1993, was $653.

In 1994, Addington's estimated Average Salary was $73,740, and his estimated Covered Compensation Base was $29,088. Using Addington's 1994 estimated Average Salary of $73,740, his estimated Covered Compensation Base of $29,088 and 8.8333 years of Benefits Accrual Service, the Pittston Plan New Formula produces a result of $1,022.13 per month. Addington's 1994 Annual Benefit Statement estimated his future monthly retirement benefits as $223 from the Paramont Plans and $1,022 from the Pittston Plan. The benefit estimate printed on Addington's 1994 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Addington's 1994 Annual Benefit Statement estimated that Addington's accrued monthly benefits as of January 1, 1994, was $788.

Addington's 1994 Annual Benefit Statement also estimated that if Addington retired early on November 1, 1994, his early retirement benefit would be $766 per month. If Addington retired on November 1, 1994, and

using an Average Salary of $74,054.12, a Covered Compensation Base of $29,088 and 5.8333 years of Benefit Accrual Service, Addington's pension benefit, including both his Pittston Plan New Formal benefit and his Paramont Plans benefit would be $766.13.

In 1995, Addington's estimated Average Salary was $74,486, and his estimated Covered Compensation Base was $29,148. Using Addington's 1995 estimated Average Salary of $74,486, his estimated Covered Compensation Base of $29,148 and 8.8333 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,033.42 per month. Addington's 1995 Annual Benefit Statement estimated his future monthly retirement benefits as $223 from the Paramont Plans and $1,033 from the Pittston Plan. The benefit estimate printed on Addington's 1995 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Addington's 1995 Annual Benefit Statement estimated that Addington's accrued monthly benefits as of January 1, 1995, was $925.

Using Addington's actual Average Salary of $75,935.28, Benefit Accrual Service of six years and his Covered Compensation Base of $29,088, the Pittston Plan New Formula produces a result of $717.33. Adding Addington's Paramont Plans benefit of $223.13 and reducing his benefit by an early retirement reduction factor of .858 produces a result of $806.91 per month. Using Addington's actual Average Salary of $75,935.28, Benefit Accrual Service of 19 years and his Covered

Compensation Base of $29,088, the Pittston Plan New Formula produces a result of $2,271.54. Adding Addington's Paramont Plans benefit of $223.13 and reducing his benefit by an early retirement reduction factor of .858 produces a result of $2,140.43 per month.

The parties agree that Paramont hired Jack Blanton, ("Blanton"), on July 8, 1974, and that he was an employee of Paramont on July 7, 1986, the date it was acquired by Pyxis. Blanton terminated employment with Paramont on December 13, 2002. As of January 1, 1989, Blanton was entitled to receive a monthly retirement benefit of $153.79 under the Paramont Plans. Blanton's Normal Retirement Date was June 1, 2018. There are 29.4166 years of Benefit Accrual Service between January 1, 1989, and June 1, 2018. There are 14 years of Benefit Accrual Service from January 1, 1989, to December 13, 2002. From July 8, 1974, to December 13, 2002, there are 28.621 years of service.

In 1992, Blanton's estimated Average Salary was $45,888.66, and his estimated Covered Compensation Base was $45,888. Using Blanton's 1992 estimated Average Salary of $45,888.66, his estimated Covered Compensation Base of $45,888 and 29.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,557.82 per month. Blanton's 1992 Annual Benefit Statement estimated his future monthly retirement benefits as $153 from the Paramont Plans and $1,557 from the Pittston Plan. The benefit estimate printed on Blanton's 1992 Annual Benefit Statement was calculated by counting years of service from January 1,

1989, although this date was not printed on the Annual Benefit Statement. Blanton's *861 1992 Annual Benefit Statement estimated that Addington's accrued monthly benefits as of January 1, 1992, was $331.

In 1993, Blanton's estimated Average Salary was $46,346, and his estimated Covered Compensation Base was $46,346. Using Blanton's 1993 estimated Average Salary of $46,346, his estimated Covered Compensation Base of $46,346 and 29.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,573.35 per month. Blanton's 1993 Annual Benefit Statement estimated his future monthly retirement benefits as $153 from the Paramont Plans and $1,573 from the Pittston Plan. The benefit estimate printed on Blanton's 1993 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Blanton's 1993 Annual Benefit Statement estimated that Blanton's accrued monthly benefits as of January 1, 1993, was $393.

In 1994, Blanton's estimated Average Salary was $45,144, and his estimated Covered Compensation Base was $45,144. Using Blanton's 1994 estimated Average Salary of $45,144, his estimated Covered Compensation Base of $45,144 and 29.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,532.54 per month. Blanton's 1994 Annual Benefit Statement estimated his future monthly retirement benefits as $153 from the Paramont Plans and $1,532 from the Pittston Plan. The benefit estimate

printed on Blanton's 1994 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Blanton's 1994 Annual Benefit Statement estimated that Blanton's accrued monthly benefits as of January 1, 1994, was $445.

In 1995, Blanton's estimated Average Salary was $44,980.66, and his estimated Covered Compensation Base was $44,980.66. Using Blanton's 1995 estimated Average Salary of $44,980.66, his estimated Covered Compensation Base of $44,980.66 and 29.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,526.99 per month. Blanton's 1995 Annual Benefit Statement estimated his future monthly retirement benefits as $153 from the Paramont Plans and $1,526 from the Pittston Plan. The benefit estimate printed on Blanton's 1995 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Blanton's 1995 Annual Benefit Statement estimated that Blanton's accrued monthly benefits as of January 1, 1995, was $502.

In 1996, Blanton's estimated Average Salary was $44,166.33, and his estimated Covered Compensation Base was $44,166.33. Using Blanton's 1996 estimated Average Salary of $44,166.33, his estimated Covered Compensation Base of $44,166.33 and 29.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,499.35 per month. Blanton's 1996 Annual Benefit Statement estimated his future monthly

retirement benefits as $153 from the Paramont Plans and $1,499 from the Pittston Plan. The benefit estimate printed on Blanton's 1996 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Blanton's 1996 Annual Benefit Statement estimated that Blanton's accrued monthly benefits as of January 1, 1996, was $553.

In 1997, Blanton's estimated Average Salary was $45,176.33, and his estimated Covered Compensation Base was $45,176.33. Using Blanton's 1997 estimated Average Salary of $45,176.33, his estimated Covered Compensation Base of $45,176.33 and 29.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,533.64 per month. Blanton's 1997 Annual Benefit Statement estimated his future monthly retirement benefits as $153 from the Paramont Plans and $1,533 from the Pittston Plan. The benefit estimate printed on Blanton's 1997 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Blanton's 1997 Annual Benefit Statement estimated that Blanton's accrued monthly benefits as of January 1, 1997, was $620.

In 1998, Blanton's estimated Average Salary was $47,283.33, and his estimated Covered Compensation Base was $47,283.33. Using Blanton's 1998 estimated Average Salary of $47,283.33, his estimated Covered Compensation Base of $47,283.33 and 29.4166 years of Benefit Accrual Service, the Pittston Plan New Formula

produces a result of $1,605.17 per month. Blanton's 1998 Annual Benefit Statement estimated his future monthly retirement benefits as $153 from the Paramont Plans and $1,605 from the Pittston Plan. The benefit estimate printed on Blanton's 1998 Annual Benefit Statement was calculated by counting years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statement. Blanton's 1998 Annual Benefit Statement estimated that Blanton's accrued monthly benefits as of January 1, 1998, was $703.

Using Blanton's December 31, 2000, estimated Average Salary of $47,137.41, his estimated Covered Compensation Base of $45,358.33 and 12 years of Benefit Accrual Service (years between January 1, 1989, and December 31, 2000), the Pittston Plan New Formula produces a result of $740.41. Blanton received a pension estimate on or about November 30, 2000, that provided that his accrued benefit as of December 31, 2000, would be $153.79 under the Paramont Plans and $740.42 under the Pittston Plan, for a total monthly benefit of $894.21.

Using Blanton's actual Average Salary of $47,137.41, Benefit Accrual Service of 14 years and his Final Covered Compensation Base of $41,816.04, the Pittston Plan New Formula produces a result of $886.55. Adding Blanton's Paramont Plans benefit of $153.79 and, assuming he retires on his Normal Retirement Date and elects a single life annuity, produces a result of $1,040.34 per month. Using Blanton's actual Average Salary of $47,137.41, Benefit Accrual Service of 28.621 years and his Covered Compensation Base of $41,816.04, the

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Pittston Plan New Formula produces a result of $1,655.96. Adding Blanton's Paramont Plans benefit of $153.79 and, assuming he retires on his Normal Retirement Date and elects a single life annuity, produces a result of $1,809.75 per month.

The parties agree that Paramont hired Alton Lawson Jr., ("Lawson"), on February 2, 1976, and that he was an employee of Paramont on July 7, 1986, the date it was acquired by Pyxis. On January 1, 1988, Lawson transferred to Pyxis. Pyxis laid off Lawson effective February 15, 1988. As of January 1, 1988, Lawson was entitled to receive a monthly retirement benefit of $170 under the Paramont Plans. Lawson worked for non-Pittston companies and did not participate in the Pittston Plan between his layoff on February 15, 1988, and September 10, 1990. On September 10, 1990, Holston Mining, Inc., a participating Company in the Pittston Plan, hired Lawson. Lawson worked for participating Companies in the Pittston Plan from September 10, 1990, until December 13, 2002. Lawson's Normal Retirement Date is August 1, 2010. There are 20 years of Benefit Accrual Service between September 10, 1990, and August 1, 2010. There are 22.5833 years of Benefit Accrual Service from January 1, 1988, to August 1, 2010. Lawson retired on January 1, 2003. From September 10, 1990, to December 13, 2002, there are 12.373 years of service. From February 2, 1976, to February 15, 1988, and from September 10, 1990, to December 13, 2002, there are 24.373 years of service. Lawson received Annual Benefit Statements in 1993, 1994, 1995, 1996, 1997 and 1998.

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In 1988, Lawson's estimated Average Salary was $43,680 and his estimated Social Security Benefit was $11,508. Using Lawson's 1988 estimated Average Salary of $43,680, his estimated Social Security Benefit of $11,508 and 22.5833 years of Benefit Accrual Service, the Pittston Plan Old Formula produces a result of $1,455.55 per month. Lawson's 1988 Annual Benefit Statement estimated his future monthly retirement benefits as $1,455. The benefit estimate printed on Lawson's 1988 Annual Benefit Statement was calculated by counting years of service from January 1, 1988, although this date was not printed on the Annual Benefit Statement. Lawson's 1988 Annual Benefit Statement estimated that Lawson's accrued monthly benefits as of January 1, 1988, was $0.

In 1992, Lawson's estimated Average Salary was $33,516, and his estimated Covered Compensation Base was $33,516. Using Lawson's 1992 estimated Average Salary of $33,516, his estimated Covered Compensation Base of $33,516 and 20 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $865.83 per month. Lawson's 1992 Annual Benefit Statement estimated his future monthly retirement benefits as $1,168 from the Pittston Plan. The benefit estimate printed on Lawson's 1992 Annual Benefit Statement was calculated by counting years of service from September 11, 1978, although this date was not printed on the Annual Benefit Statement. Lawson's 1992 Annual Benefit Statement estimated that Lawson's accrued monthly benefits as of January 1, 1992, was $573.

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In 1993, Lawson's estimated Average Salary was $37,400, and his estimated Covered Compensation Base was $37,400. Using Lawson's 1993 estimated Average Salary of $37,400, his estimated Covered Compensation Base of $37,400 and 20 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $966.17 per month. Lawson's 1993 Annual Benefit Statement estimated his future monthly retirement benefits as $ 1,303 from the Pittston Plan. The benefit estimate printed on Lawson's 1993 Annual Benefit Statement was calculated by counting years of service from September 11, 1978, although this date was not printed on the Annual Benefit Statement. Lawson's 1993 Annual Benefit Statement estimated that Lawson's accrued monthly benefits as of January 1, 1993, was $496.

In 1994, Lawson's estimated Average Salary was $44,900 and his estimated Covered Compensation Base was $44,900. Using Lawson's 1994 estimated Average Salary of $44,900, his estimated Covered Compensation Base of $44,900 and 20 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,159.92 per month. Lawson's 1994 Annual Benefit Statement estimated his future monthly retirement benefits as $1,564 from the Pittston Plan. The benefit estimate printed on Lawson's 1994 Annual Benefit Statement was calculated by counting years of service from September 11, 1978, although this date was not printed on the Annual Benefit Statement. Lawson's 1994 Annual Benefit Statement estimated that Lawson's accrued monthly benefits as of January 1, 1994, was $872.

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In 1995, Lawson's estimated Average Salary was $54,042.66, and his estimated Covered Compensation Base was $50,160. Using Lawson's 1995 estimated Average Salary of $54,042.66, his estimated Covered Compensation Base of $50,160 and 20 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,431.69 per month. Lawson's 1995 Annual Benefit Statement estimated his future monthly retirement benefits as $1,940 from the Pittston Plan. The benefit estimate printed on Lawson's 1995 Annual Benefit Statement was calculated by counting years of service from September 11, 1978, although this date was not printed on the Annual Benefit Statement. Lawson's 1995 Annual Benefit Statement estimated that Lawson's accrued monthly benefits as of January 1, 1995, was $1,163.

In 1996, Lawson's estimated Average Salary was $57,091.66, and his estimated Covered Compensation Base was $54,588. Using Lawson's 1996 estimated Average Salary of $57,091.66, his estimated Covered Compensation Base of $54,588 and 20 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,497.82 per month. Lawson's 1996 Annual Benefit Statement estimated his future monthly retirement benefits as $2,026 from the Pittston Plan. The benefit estimate printed on Lawson's 1996 Annual Benefit Statement was calculated by counting years of service from September 11, 1978, although this date was not printed on the Annual Benefit Statement. Lawson's 1996 Annual Benefit Statement estimated that Lawson's accrued monthly benefits as of January 1, 1996, was $1,291.

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In 1997, Lawson's estimated Average Salary was $55,040.33, and his estimated Covered Compensation Base was $52,008. Using Lawson's 1997 estimated Average Salary of $55,040.33, his estimated Covered Compensation Base of $52,008 and 20 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,449.67 per month. Lawson's 1997 Annual Benefit Statement estimated his future monthly retirement benefits as $1,962 from the Pittston Plan. The benefit estimate printed on Lawson's 1997 Annual Benefit Statement was calculated by counting years of service from September 11, 1978, although this date was not printed on the Annual Benefit Statement. Lawson's 1997 Annual Benefit Statement estimated that Lawson's accrued monthly benefits as of January 1, 1997, was $1,322.

In 1998, Lawson's estimated Average Salary was $56,996, and his estimated Covered Compensation Base was $53,208. Using Lawson's 1998 estimated Average Salary of $56,996, his estimated Covered Compensation Base of $53,208 and 20 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,507.12 per month. Lawson's 1998 Annual Benefit Statement estimated his future monthly retirement benefits as $2,041 from the Pittston Plan. The benefit estimate printed on Lawson's 1998 Annual Benefit Statement was calculated by counting years of service from September 11, 1978, although this date was not printed on the Annual Benefit Statement. Lawson's 1998 Annual Benefit Statement estimated that Lawson's accrued monthly benefits as of January 1, 1998, was $1,450.

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Using Lawson's January 2000 estimated Average Salary of $56,995.92, his estimated Covered Compensation Base of $42,801 and 10 years of Benefit Accrual Service (accrued between September 10, 1990, and July 31, 2000), the Pittston Plan New Formula produces a result of $801.26. Lawson received a pension estimate on or about January 10, 2000, that provided that his accrued benefit under the Pittson Plan was $971.26, which included $170 in benefits under the Paramont Plans.

Using Lawson's actual Average Salary of $56,995.93, Benefit Accrual Service of 12.373 and his Final Covered Compensation Base of $44,418.81, the Pittston Plan New Formula produces a result of $982.22. Adding Lawson's Paramont Plans benefit of $170 and reducing his benefit by an early retirement reduction factor of .621 produces a result of $779.96 per month. Using Lawson's actual Average Salary of $56,995.93, Benefit Accrual Service of 24.373 years and his Final Covered Compensation Base of $44,418.81, the Pittston Plan New Formula produces a result of $1,934.83. Adding Lawson's Paramont Plans benefit of $170 and reducing his benefit by an early retirement reduction factor of .621 produces a result of $1,371.53 per month.

The parties agree that Paramont hired Ricky D. Meade, ("Meade"), on July 12, 1977. Paramont placed Meade on temporary and then permanent layoff status on July 12, 1985. Meade was not an employee of Paramont on July 7, 1986, the date it was acquired by Pyxis. As of January 1, 1989, Meade was entitled to

receive a monthly retirement benefit of $78.48 under the Paramont Plans. On February 19, 1990, Meade became a Pyxis employee. On September 29, 1990, Meade transferred to The Pittston Company. On May 11, 1992, Meade transferred to Pyxis. On January 1, 1995, Meade transferred to Maxim Management Company. On April 1, 1995, Meade transferred to Pittston Coal Management Company. On September 3, 1996, Meade transferred to Pittston Coal Sales Corporation. On January 1, 1998, Meade transferred to Pittston Coal Management Company. On October 24, 1998, Meade transferred to Pittston Coal Sales Corporation. On January 11, 2001, Meade terminated his employment with all Pittston Plan Participating Companies. Meade became a Pittston Plan Participant on February 19, 1990. Meade's Normal Retirement Date is August 1, 2023. There are 33.4166 years of Benefit Accrual Service between February 19, 1990, and August 1, 2023. From February 19, 1990, to January 11, 2001, there are 11 years of service. From July 12, 1977, to July 12, 1985, and from February 19, 1990, to January 12, 2001, there are 19 years of service. Meade received Annual Benefit Statements in 1991, 1992, 1993, 1995, 1996, 1997 and 1998.

In 1991, Meade's estimated Average Salary was $25,000, and his estimated Covered Compensation Base was $25,000. Using Meade's estimated Average Salary of $25,000, his estimated Covered Compensation Base of $25,000 and 33.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $886.20 per month. Meade's 1991 Annual Benefit Statement estimated his future monthly retirement

benefits as $1,041. The benefit estimate printed on Meade's 1991 Annual Benefit Statement was calculated by counting years of service from October 28, 1981, although this date was not printed on the Annual Benefit Statement. Meade's 1991 Annual Benefit Statement estimated that Lawson's accrued monthly benefits as of January 1, 1991, was $296.

In 1992, Meade's estimated Average Salary was $26,750, and his estimated Covered Compensation Base was $26,750. Using Meade's 1992 estimated Average Salary of $26,750, his estimated Covered Compensation Base of $26,750 and 33.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $948.23 per month. Meade's 1992 Annual Benefit Statement estimated his future monthly retirement benefits as $1,114 from the Pittston Plan. The benefit estimate printed on Meade's 1992 Annual Benefit Statement was calculated by counting years of service from October 28, 1981, although this date was not printed on the Annual Benefit Statement. Meade's 1992 Annual Benefit Statement estimated that Meade's accrued monthly benefits as of January 1, 1992, was $326.

In 1993, Meade's estimated Average Salary was $31,500, and his estimated Covered Compensation Base was $31,500. Using Meade's 1993 estimated Average Salary of $31,500, his estimated Covered Compensation Base of $31,500 and 33.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,116.60 per month. Meade's 1993 Annual Benefit Statement estimated his future monthly

retirement benefits as $1,116 from the Pittston Plan. The benefit estimate printed on Meade's 1993 Annual Benefit Statement was calculated by counting years of service from February 19, 1990, although this date was not printed on the Annual Benefit Statement. Meade's 1993 Annual Benefit Statement estimated that Meade's accrued monthly benefits as of January 1, 1993, was $96.

In 1995, Meade's estimated Average Salary was $40,400, and his estimated Covered Compensation Base was $40,400. Using Meade's 1995 estimated Average Salary of $40,400, his estimated Covered Compensation Base of $40,400 and 33.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,432.09 per month. Meade's 1995 Annual Benefit Statement estimated his future monthly retirement benefits as $1,432 from the Pittston Plan. The benefit estimate printed on Meade's 1995 Annual Benefit Statement was calculated by counting years of service from February 19, 1990, although this date was not printed on the Annual Benefit statement. Meade's 1995 Annual Benefit Statement estimated that Meade's accrued monthly benefits as of January 1, 1995, was $207.

In 1996, Meade's estimated Average Salary was $48,000, and his estimated Covered Compensation Base was $48,000. Using Meade's 1996 estimated Average Salary of $48,000, his estimated Covered Compensation Base of $48,000 and 33.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,701.50 per month. Meade's 1996 Annual Benefit Statement estimated his future monthly

retirement benefits as $2,000 from the Pittston Plan. The benefit estimate printed on Meade's 1996 Annual Benefit Statement was calculated by counting years of service from October 28, 1981, although this date was not printed on the Annual Benefit Statement. Meade's 1996 Annual Benefit Statement estimated that Meade's accrued monthly benefits as of January 1, 1996, was $676.

In 1997, Meade's estimated Average Salary was $52,400, and his estimated Covered Compensation Base was $52,400. Using Meade's 1997 estimated Average Salary of $52,400, his estimated Covered Compensation Base of $52,400 and 33.4166 years of Benefits Accrual Service, the Pittston Plan New Formula produces a result of $1,857.47 per month. Meade's 1997 Annual Benefit Statement estimated his future monthly retirement benefits as $2,183 from the Pittston Plan. The benefit estimate printed on Meade 's 1997 Annual Benefit Statement was calculated by counting years of service from October 28, 1981, although this date was not printed on the Annual Benefit Statement. Meade's 1997 Annual Benefit Statement estimated that Meade's accrued monthly benefits as of January 1, 1997, was $831.

In 1998, Meade's estimated Average Salary was $52,400, and his estimated Covered Compensation Base was $52,400. Using Meade's 1998 estimated Average Salary of $52,400, his estimated Covered Compensation Base of $52,400 and 33.4166 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,857.47 per month. Meade's 1998 Annual Benefit Statement estimated his future monthly

retirement benefits as $2,183 from the Pittston Plan. The benefit estimate printed on Meade's 1998 Annual Benefit Statement was calculated by counting years of service from October 28, 1981, although this date was not printed on the Annual Benefit Statement. Meade's 1998 Annual Benefit Statement estimated that Meade's accrued monthly benefits as of January 1, 1998, was $1,006.

Using Meade's December 31, 2000, estimated Average Salary of $62,896.42, his estimated Covered Compensation Base of $55,505.24 and 11 years of Benefit Accrual Service (accrued between February 19, 1990, and December 31, 2000), the Pittston Plan New Formula produces a result of $930.92. Meade received a pension estimate on or about November 30, 2000, that provided that his accrued benefit under the Pittston Plan was $ 930.32 as of December 31, 2000.

Using Meade's actual Average Salary of $67,197.08, Benefit Accrual Service of 11 years and his Final Covered Compensation Base of $63,808.90, the Pittston Plan New Formula produces a result of $971.84. Adding Meade's Paramont Plans benefit of $78.48 and, assuming that Meade will retire on his Normal Retirement Date and elect a single life annuity, produces a result of $1050.32 per month. Using Meade's actual Average Salary of $67,197.08, Benefit Accrual Service of 19 years and his Final Covered Compensation Base of $63,808.90, the Pittston Plan New Formula produces a result of $1,678.63. Adding Meade's Paramont Plans benefit of $78.48 and, assuming that Meade will retire on his Normal Retirement Date and elect a single life annuity, produces a result of $1757.11 per month.

Appendix C

The parties agree that Paramont hired Donald Ratliff, ("Ratliff"), on June 16, 1978, and that he was an employee of Paramont on July 7, 1986, the date it was acquired by Pyxis. On January 1, 1988, Ratliff transferred to Pyxis. As of January 1, 1988, Ratliff was entitled to receive a monthly retirement benefit of $111.19 under the Paramont Plans. On October 1, 1991, Ratliff transferred to Pittston Coal Management Company. On February 1, 1992, Ratliff transferred to Pyxis. On January 1, 1995, Ratliff transferred to Maxim Management Company. On April 1, 1995, Ratliff transferred to Pittston Coal Management Company. On May 17, 1996, Ratliff transferred to Maxim Management Company. On June 1, 1996, Ratliff transferred to Pittston Coal Management Company. On August 24, 2001, Ratliff terminated his employment with all participating Companies in the Pittston Plan. Ratliff's Normal Retirement Date is September 1, 2018. There are 30.6666 years of Benefit Accrual Service between January 1, 1988, and September 1, 2018. From January 1, 1988, to August 24, 2001, there are 13.934 years of service. From June 16, 1978, to August 24, 2001, there are 23.273 years of service. Ratliff received Annual Benefit Statements in 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997 and 1998.

In 1988, Ratliff's estimated Average Salary was $43,212, and his estimated Social Security Benefit was $11,796. Using Ratliff's 1988 estimated Average Salary of $43,212, his estimated Social Security Benefit of $11,796 and 30.6666 years of Benefit Accrual Service, the Pittston Plan Old Formula produces a result of

$1,717.76 per month. Ratliff's 1988 Annual Benefit Statement estimated his future monthly retirement benefits as $1,717. The benefit estimate printed on Ratliff's 1988 Annual Benefit Statement was calculated by counting years of service from January 1, 1988, although this date was not printed on the Annual Benefit Statement. Ratliff's 1988 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1983, was $0.

In 1989, Ratliff's estimated Average Salary was $46,116, and his estimated Social Security Benefit was $12,528. Using Ratliff's 1989 estimated Average Salary of $46,116, his estimated Social Security Benefit of $12,528 and 30.6666 years of Benefit Accrual Service, the Pittston Plan Old Formula produces a result of $1,835.14 per month. Ratliff's 1989 Annual Benefit Statement estimated his future monthly retirement benefits as $1,835. The benefit estimate printed on Ratliff's 1989 Annual Benefit Statement was calculated by counting years of service from January 1, 1988, although this date was not printed on the Annual Benefit Statement. Ratliff's 1989 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1989, was $64.

In 1990, Ratliff's estimated Average Salary was $52,019, and his estimated Covered Compensation Base was $50,400. Using Ratliff's 1990 estimated Average Salary of $52,019, his estimated Covered Compensation Base of $50,400 and 30.6666 years of Benefit Accrual Service, the Pittston Plan New Formula produces a

result of $1,813.07 per month. Ratliff's 1990 Annual Benefit Statement estimated his future monthly retirement benefits as $1,813 from the Pittston Plan. The benefit estimate printed on Ratliff's 1990 Annual Benefit Statement was calculated by counting years of service from January 1, 1988, although this date was not printed on the Annual Benefit Statement. Ratliff's 1990 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1990, was $118.

In 1991, Ratliff's estimated Average Salary was $55,146, and his estimated Covered Compensation Base was $52,200. Using Ratliff's 1992 estimated Average Salary of $55,146, his estimated Covered Compensation Base of $52,200 and 30.6666 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $1,939.34 per month. Ratliff's 1991 Annual Benefit Statement estimated his future monthly retirement benefits as $2,050 from the Pittston Plan. The benefit estimate printed on Ratliff's 1991 Annual Benefit Statement was calculated by counting years of service from January 1, 1988, although this date was not printed on the Annual Benefit Statement. Ratliff's 1991 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1991, was $296.

In 1992, Ratliff's estimated Average Salary was $70,400, and his estimated Covered Compensation Base was $53,400. Using Ratliff's 1992 estimated Average Salary of $70,400, his estimated Covered Compensation Base of $53,400 and 30.6666 years of Benefit Accrual Service, the Pittston Plan New Formula produces a

result of $2,661.88 per month. Ratliff's 1992 Annual Benefit Statement estimated his future monthly retirement benefits as $111 from the Paramont Plans and $3,113 from the Pittston Plan. The benefit estimate printed on Ratliff's 1992 Annual Benefit Statement was calculated by counting years of service from June 16, 1978, although this date was not printed on the Annual Benefit Statement. Ratliff's 1992 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1992, was $1,443.

In 1993, Ratliff's estimated Average Salary was $71,610, and his estimated Covered Compensation Base was $55,200. Using Ratliff's 1993 estimated Average Salary of $71,610, his estimated Covered Compensation Base of $55,200 and 30.6666 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $2,695.22 per month. Ratliff's 1993 Annual Benefit Statement estimated his future monthly retirement benefits as $111 from the Paramont Plans and $2,695 from the Pittston Plan. The benefit estimate *869 printed on Ratliff's 1993 Annual Benefit Statement was calculated by counting years of service from January 1, 1988, although this date was not printed on the Annual Benefit Statement. Ratliff's 1993 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1993, was $562.

In 1994, Ratliff's estimated Average Salary was $80,464, and his estimated Covered Compensation Base was $57,480. Using Ratliff's 1994 estimated Average Salary of $80,464, his estimated Covered Compensation

Base of $57,480 and 30.6666 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $3,092.35 per month. Ratliff's 1994 Annual Benefit Statement estimated his future monthly retirement benefits as $111 for the Paramont Plans and $3,092 from the Pittston Plan. The benefit estimate printed on Ratliff's 1994 Annual Benefit Statement was calculated by counting years of service from January 1, 1988, although this date was not printed on the Annual Benefit Statement. Ratliff's 1994 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1994, was $756.

In 1995, Ratliff's estimated Average Salary was $79,309, and his estimated Covered Compensation Base was $57,900. Using Ratliff's 1995 estimated Average Salary of $79,309, his estimated Covered Compensation Base of $57,900 and 30.6666 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $3,030.46 per month. Ratliff's 1995 Annual Benefit Statement estimated his future monthly retirement benefits as $111 for the Paramont Plans and $3,030 from the Pittston Plan. The benefit estimate printed on Ratliff's 1995 Annual Benefit Statement was calculated by counting years of service from January 1, 1988, although this date was not printed on the Annual Benefit Statement. Ratliff's 1995 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1995, was $896.

In 1996, Ratliff's estimated Average Salary was $78,469.62, and his estimated Covered Compensation

Base was $61,224. Using Ratliff's 1996 estimated Average Salary of $78,469.62, his estimated Covered Compensation Base of $61,224 and 30.6666 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $2,943.06 per month. Ratliff's 1996 Annual Benefit Statement estimated his future monthly retirement benefits as $111 for the Paramont Plans and $3,442 from the Pittston Plan. The benefit estimate printed on Ratliff's 1996 Annual Benefit Statement was calculated by counting years of service from June 16, 1978, although this date was not printed on the Annual Benefit Statement. Ratliff's 1996 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1996, was $2,023.

In 1997, Ratliff's estimated Average Salary was $79,000, and his estimated Covered Compensation Base was $60,708. Using Ratliff's 1997 estimated Average Salary of $79,000, his estimated Covered Compensation Base of $60,708 and 30.6666 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $2,976.02 per month. Ratliff's 1997 Annual Benefit Statement estimated his future monthly retirement benefits as $111 for the Paramont Plans and $3,480 from the Pittston Plan. The benefit estimate printed on Ratliff's 1997 Annual Benefit Statement was calculated by counting years of service from June 16, 1978, although this date was not printed on the Annual Benefit Statement. Ratliff's 1997 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1997, was $2,011.

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In 1998, Ratliff's estimated Average Salary was $94,100, and his estimated Covered Compensation Base was $62,592. Using Ratliff's 1998 estimated Average Salary of $94,100, his estimated Covered Compensation Base of $62,592 and 30.6666 years of Benefit Accrual Service, the Pittston Plan New Formula produces a result of $3,681.47 per month. Ratliff's 1998 Annual Benefit Statement estimated his future monthly retirement benefits as $111 for the Paramont Plans and $4,302 from the Pittston Plan. The benefit estimate printed on Ratliff's 1998 Annual Benefit Statement was calculated by counting years of service from June 16, 1978, although this date was not printed on the Annual Benefit Statement. Ratliff's 1998 Annual Benefit Statement estimated that Ratliff's accrued monthly benefits as of January 1, 1998, was $2,356.

Using Ratliff's December 31, 2000, estimated Average Salary of $101,056.19, his estimated Covered Compensation Base of $67,164 and 13 years of Benefit Accrual Service (accrued between January 1, 1988, and December 31, 2000), the Pittston Plan New Formula produces a result of $1,898.84. Ratliff received a pension estimate on or about November 30, 2000, that provided that his accrued benefit under the Pittson Plan, as of December 31, 2000, was $2,010.03, which included $111.19 in benefits under the Paramont Plans.

Using Ratliff's actual Average Salary of $115,728.65, Benefit Accrual Service of 13.934 years and his Covered Compensation Base of $69,444, the Pittston Plan New Formula produces a result of $2,378.49. Adding Ratliff's

Paramont Plans benefit of $111.19, and assuming that he retires on his Normal Retirement Date and elects a single life annuity, produces a result of $2,489.68 per month. Using Ratliff's actual Average Salary of $115,728.65, Benefit Accrual Service of 23.273 years and his Covered Compensation Base of $69,444, the Pittston Plan New Formula produces a result of $3,972.62. Adding Ratliff's Paramont Plans benefit of $111.19, and assuming that he retires on his Normal Retirement Date and elects a single life annuity, produces a result of $4,083.81 per month.

Plaintiffs' remaining claim rests on allegations that certain Pittston Plan representatives misrepresented that plaintiffs would receive credit for their time worked with Paramont prior to July 1, 1989, in the calculation of their retirement benefits under the Pittston Plan. Mike Quillen testified that he began work with Paramont in 1976 and was Paramont's president at the time of its acquisition by Pyxis in 1986. Quillen testified that he made this representation to numerous Paramont employees on numerous occasions.

Quillen testified that, at the time of Paramont's acquisition by Pittston in 1986, Paramont had two defined-benefit retirement plans, the Salaried Employees' Pension Plan of Paramont Coal Corporation and the Hourly Employees' Pension Plan of Paramont Coal Corporation. Quillen further testified that he was a trustee of the Paramont Plans, and that as a trustee he had a duty to understand the terms of the Paramont Plans. Quillen testified that as a trustee of the Paramont

Plans he served as a fiduciary of the Paramont Plans. Quillen further testified that when he communicated with employees about the Paramont Plans, he tried to be truthful and that, if he had thought any employees were under a misimpression of their benefits, he would have attempted to correct that. Quillen also testified that he was never a trustee of the Pittston Plan. Quillen testified that he never had any administrative responsibility, any control over or any discretion regarding the Pittston Plan. Quillen further testified that he was never authorized to speak on behalf of the Pittston Plan, other than on the one occasion when Joseph Farrell, Pittston's Senior or Executive Vice President, asked him to explain the Pittston employee benefits, including the Pittston Plan, to Paramont's employees at the time of its acquisition by Pyxis.

Quillen testified that prior to Pyxis's acquisition of Paramont in 1986 he was asked to travel to Pittston's corporate headquarters in Greenwich, Connecticut, to meet with Farrell. He stated that in this meeting, Farrell expressed to him Pittston's desire for Paramont to remain nonunion after its acquisition by Pyxis. Quillen testified that he and Farrell discussed a number of incentives that could be given to Paramont's employees in an effort to convince them to remain nonunion after Paramont's acquisition by Pyxis. Quillen testified, "the primary thing that we discussed was moving from the current Paramont pension and retirement plan to the Pittston salaried union free pension plan." Quillen also testified that he and Farrell discussed giving Paramont employees credit for their years of service with

Paramont in the calculation of their benefits under the Pittston Plan, and that they further discussed the resulting larger pension benefits for Paramont employees under the Pittston Plan.

Many of the questions posed to Quillen on direct examination assumed that Farrell represented to Quillen that, after the acquisition of Paramont by Pyxis, that Paramont's employees would be eligible for benefits under the Pittston Plan and that their years of service with Paramont prior to 1986 would be included in calculating their benefits under the Pittston Plan. Quillen, however, never testified to this fact. In fact, Quillen never specifically testified that Farrell stated that Paramont's employees would be eligible for retirement benefits under the Pittston Plan or that their years of service with Paramont would be used in the calculation of these benefits. Instead, Quillen simply testified that, after his discussions with Farrell, Farrell instructed him to go to Paramont's employees and "explain their whole benefit package . . . — including the Pittston pension plan." Furthermore, Quillen also admitted that at the time of his discussions with Farrell he did not understand the difference between vesting service and Benefit Accrual Service under the Pittston Plan.

Quillen testified that, as a result of this meeting with Farrell, he returned to Virginia and told Paramont employees that they would be covered by the Pittston Plan at the time of Pyxis's acquisition and that all of their years of service with Paramont would be included in the

calculation of their benefits under the Pittston Plan. Exactly why Quillen made these representations to Paramont employees is unclear, based on the fact that the overwhelming evidence in this case shows that Quillen clearly knew that there would be no change in the Paramont employees' benefits at the time of Paramont's acquisition by Pyxis.

Quillen also testified that, prior to Pyxis's acquisition of Paramont, he also had discussions with Farrell regarding the terms of his continuing employment with Paramont after the acquisition. Quillen stated that, on or about July 2, 1986, he sent a letter to Farrell, summarizing a discussion that they had on July 1, 1986, (Exhibit 137) ("Quillen's 7-2-86 Letter"). Quillen's 7-2-86 Letter states in part:

> My understanding of our discussion is that I will retain the title of President, Paramont Coal Corporation and will also assume a position of Senior Vice President, Pyxis Resources, Inc. . . . I will also receive credit for five years prior service upon five years service with Pittston toward my pension; thus, in effect, vesting me at five years equal to ten years in the present pension plan. It is understood that the Pittston Company will internally provide the difference versus the present ERISA approved pension plan.

Despite the content of this letter, Quillen claimed on cross-examination that, at the time he wrote this letter,

he thought that he would receive credit for all of his years of service with Paramont in the calculation of his benefits under the Pittston Plan.

Quillen also testified that he received, reviewed and signed, indicating his agreement with, a letter from T.W. Garges, President of Pyxis Resources Company, setting forth the terms of his continuing employment after Pyxis's acquisition of Paramont, (Exhibit 138) ("Garges's 7-8-86 Letter"). Garges's 7-8-86 Letter states in part:

> We would like to confirm the arrangements made with respect to your employment effective from and after the closing . . . of our purchase of all of the shares of Paramont Coal Corporation . . . under the Stock Purchase Agreement dated June 6, 1986. . . .
>
> 3. We have also agreed with you that, in determining the amount which will be payable to you as retirement benefit, your "Benefit Accrual Service" as defined in the [Pittston Plan] shall be increased by five years. If your right to a retirement benefit shall have vested under the [Pittston] Plan at the time when your employment ceases, the additional amount payable by virtue of such five-year increase shall be paid as a supplemental pension otherwise than under the

> [Pittston Plan]. If your right shall not have vested at such time but would have vested if your Benefits Accrual Service had included such five-year increase, you will be entitled to receive a retirement benefit (which shall be paid otherwise than under the [Pittston Plan]) in the same amount to which you would have been entitled if your Benefit Accrual Service had included such five-year increase. It is, however, understood that, if after giving effect to such five-year increase as though it were Benefit Accrual Service your right to a retirement benefit would not have vested under the [Pittston Plan], you will not have any right to receive a retirement benefit under the [Pittston Plan] or otherwise.

While Quillen was not specific as to the time frame, Quillen testified that Kathy Fox, Assistant Employee Benefits Manager with Pittston met with him and other Paramont administrative personnel at some point to explain Pittston's employee benefits, including their pension plan. Quillen testified that he does not recall Fox ever making any presentation directly to Paramont's employees, but rather she trained Paramont's administrative personnel so that they could explain Pittston's employee benefits. Again, several of the questions posed to Quillen assumed that Fox told Quillen

and others that their years with Paramont prior to January 1, 1989, would be included in the calculation of their pension benefits under the Pittston Plan. Again, Quillen never testified to this fact. Instead, Quillen testified that Fox worked certain calculations and that he simply repeated to Paramont employees what Fox had told him, without ever saying exactly what Fox told him.

Quillen admitted that in February 1987, he received a memorandum from Gerry Spindler, President of Pitttston Coal Group, dated February 3, 1987, discussing the fact that Frank Lennon, Vice President of Human Resources and Administration for Pittston, had recommended merging the Paramont Plans' assets with the assets of the Pittston Plan to reduce management costs and increase returns, (Exhibit 108) ("Spindler's 2-3-87 Memo"). Spindler's 2-3-87 Memo stated in part:

> . . . It also raises the question, once again, of the status of Paramont's pension benefits and retiree medical benefits. . . .
>
> By copy of this letter, I am asking Frank Lennon to develop, with Randy Robinette, a task force and an agenda for approaching these issues.

Quillen also admitted that in 1987 and 1988 he signed a number of documents amending the terms of the Paramont Plans, (Exhibits 110, 111, 112, 113, 115, 116, 118, 119). Quillen stated that when he signed these documents he was not sure whether he was signing them

as a trustee of the Plan or as a representative of Paramont. He also admitted that he was not sure that he fully understood these amendments when he signed them. Quillen stated that when he questioned what these documents were, he was told they were part of the merger of the Paramont Plans into the Pittston Plan, although Quillen did not state who made this representation to him. Despite his claim that these amendments to the Paramont Plans were part of an ongoing process to merge the Paramont Plans, Quillen also repeatedly testified that when he signed each of these documents, he did not know that the Paramont Plans had not yet been merged into the Pittston Plan. A review of these documents shows that none of them reference a merger of the Paramont Plans into the Pittston Plan in any way.

Quillen testified that in the fall of 1987, a decision was made to transfer certain Paramont administrative employees to Pyxis. Quillen admitted that when the transfer of these employees was being discussed, he realized that Paramont employees were not covered by the same benefit package as Pyxis employees. Quillen testified that he sent a September 2, 1987, memorandum to Randy Robinette, Paramont's Director of Human Resources, asking that he prepare a benefit package summary for the employees who were to be transferred, (Exhibit 122) ("Quillen 9-2-87 Memo"). Quillen further testified that in response to his request, he received a September 16, 1987, memorandum from Robinette with a benefit comparison attached, (Exhibit 123) ("Robinette's 9-16-87 Memo"). Robinette's 9-16-87 Memo stated in part:

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> As requested I have prepared the attached benefit comparison for review. . . . The . . . Paramont employees anticipated to convert to the Pyxis benefit package should do so during the beginning of the first quarter of 1988. . . . Any unused vacation, graduated-vacation, or personal leave time would not be carried forward and would be paid by Paramont in 1987 as earnings. These employees would then be subject to the Pyxis schedule with prior Paramont service credited for leave purposes. As to pension matters, employees would be under the Pittston Plan, again, with prior Paramont service credited for vesting purposes. . . .
>
> . . . Should you have any questions or comments please advise.

Attached to Robinette's 9-16-87 Memo was a two-page chart comparing Paramont's employee benefits with Pyxis's employee benefits. This chart listed the Paramont pension benefit as:

> $350 per mo.
> @55 20 yr.
> 5 yr. vesting

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This chart listed the Pyxis pension benefit as:

2.1% Salary x
x yrs. service
s/s offset
10 yr. vesting

Quillen also testified that he sent a September 23, 1987, memorandum to Lawson explaining his transfer to Pyxis effective January 1, 1988, (Exhibit 54) ("Quillen's 9-23-87 Memo").

Quillen testified that as president of Paramont, he would have known of the content of all employee handbooks distributed to Paramont's employees. Quillen also testified that if any of these employee handbooks had contained inaccurate information, he would have attempted to correct it. Quillen further testified that he signed Paramont's 1988 employee handbook, (Exhibit 2) ("the 1988 Paramont Handbook"), before it was distributed to employees. While Quillen was uncertain as to when he received it, Quillen admitted that he had received an August 15, 1988, memorandum from Lennon to Spindler, (Exhibit 125) ("Lennon's 8-15-88 Memo"). Quillen also admitted that he received an August 24, 1988, memorandum from Robinette in 1988, (Exhibit 126) ("Robinette's 8-24-88 Memo"). Quillen further admitted that he received a copy of a September 12, 1988, memorandum from Lennon to Robinette, (Exhibit 188) ("Lennon's 9-12-88 Memo"). Lennon's 9-12-88 Memo states in part:

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Subject: *Merging Paramont Salaried Plan into Pittston PRP [Pension-Retirement Plan]*

. . .

My recommendation is that we proceed immediately with this merger so that it may be accomplished before the January 1, 1989 required date. . . .

Quillen testified that after receiving Lennon's 9-12-88 Memo he wrote on it:

Per Mgmt. Com.
9/14/88
OK to proceed
M.J.Q.

Quillen also admitted that he received a copy of a September 28, 1988, memorandum from Lennon to Robinette discussing the merger of the Paramont Hourly Plan into the Pittston Plan, (Exhibit 128) ("Lennon's 9-28-88 Memo"). Lennon's 9-28-88 Memo states in part:

Foster Higgins has determined the estimated costs of merging the Paramont hourly Pension Plan into the Pittston Plan so as to provide parity with the salaried employees. . . .

. . .

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> Once you, Mike and Jerry have an opportunity to discuss this subject, pleast let me know if you want to proceed with a January 1, 1989 merger.

Quillen testified that after receiving this memo he wrote on it:

> Gerry OK'd
> 10-6-88
> Will follow up
> w/ memo

Quillen stated that the Gerry he referred to in his notes was Gerry Spindler. Quillen admitted that these two memoranda indicate that he approved the merger of the Paramont Plans into the Pittston Plan in the fall of 1988.

On October 25, 1988, Quillen sent a memorandum to all Paramont employees explaining that there would soon be changes in their benefits, (Exhibit 21) ("Quillen's 10-25-88 Memo"). Quillen's 10-25-88 Memo stated in part:

> RE: Benefit Changes
>
> Over the next several weeks you will receive several memorandums on benefit changes which you have been hearing about. The two primary subjects are health insurance and pension benefits. Please review these documents carefully and ask questions about whatever concerns you.

Quillen testified that after this, Robinette sent a letter to all Paramont employees explaining the changes in their retirement *875 benefits, (Exhibit 3) ("Robinette's 11-10-88 Letter"). Robinette's 11-10-88 Letter states in part:

> On January 1, we will merge the [Paramont] plans into The Pension-Retirement Plan of The Pittston Company and its subsidiaries. *On that date you will* automatically become a member of The Pittston Plan and *begin to earn pension accruals under The Pittston Plan. When you retire, your pension benefit under this plan will be the combination of what you earned under the Paramont . . . Plan prior to January 1, 1989, and what you earn under the Pittston Plan for service beyond January 1, 1989.*
>
> . . .
>
> *Benefits Accrued Under The Paramont Plan Prior to January 1, 1989*
>
> When you retire, all pension benefits you have accrued under The Paramont Plan up to January 1, 1989, will be determined in accordance with the provisions of The Paramont Plan as in effect on December 31, 1988.

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Benefit Accruals After January 1, 1989

> Your pension benefits accrued from and after January 1, 1989, will be determined in accordance with the provisions of The Pittston Pension Plan. . . .

(Emphasis added.) This letter continues to explain that the Pittston Plan, like the Paramont Plan, then required five years of vesting service. The letter further states that "[a]ll vesting service under The Paramont Plan will also constitute and count as vesting service under The Pittston Plan." Robinette's 11-10-88 Letter also states:

> We all know that pensions are very complicated and technical documents and can be difficult to explain in simple terms. While we have tried hard to explain in simple language how these Plans work, and have written the pension booklet in as relatively clear and simple language as possible, we understand that you may have questions about your pension from time to time. If you have any questions of any kind about your pension under either the Paramont or Pittston Plan, please address your questions in writing to the Human Resources Department.

While Quillen could not recall whether he approved the contents of this letter before it was sent, Quillen testified that he received and read Robinette's 11-10-88 Letter after it was sent to all Paramont employees. Quillen also

testified that it would not have been unusual in 1988 for Pyxis administrative employees, including those employees who transferred from Paramont to Pyxis on January 1, 1988, to see correspondence sent to Paramont employees.

A week later, on November 17, 1988, Quillen sent a memorandum to all Paramont employees, (Exhibit 22) ("Quillen's 11-17-88 Memo"). Quillen's 11-17-88 Memo stated in part:

> . . . the Paramont Employee Salary and Hourly Pension Plans will be integrated with The Pittston Company Pension Retirement Plan which will result in significantly improved benefits. You will receive specific information as to how these changes will affect you.

Quillen admits that nothing in Quillen's 11-17-88 Memo contradicts the information in Robinette's 11-10-88 Letter.

Quillen admitted that on or about November 18, 1988, he signed a document entitled "*Unanimous Written Consent of Directors,*" (Exhibit 131) ("11-18-88 Consent of Paramont Directors"). The 11-18-88 Consent of Paramont Directors states in part:

> RESOLVED, that this Company elects to participate as a "Company" under the Pension-Retirement Plan of The Pittston Company and Its Subsidiaries (the "Pittston

Plan"), effective as of January 1, 1989, and in connection therewith:

> (i) each of . . . the Salaried Employees' Pension Plan of the Company and ... the Hourly Employees' Pension Plan of the Company (collectively, the "Paramount Plans") shall be merged into the Pittston Plan as of said effective date; . . .
>
> . . .
>
> RESOLVED, that the officers and agents of this Company be and they hereby are authorized and directed to execute all requisite documents and take all such other action as may be necessary or desirable to carry out the terms of the foregoing resolution.

Incredibly, Quillen testified that he is not sure whether or not he read the 11-18-88 Consent of Paramont Directors before he signed it. Attached to the 11-18-88 Consent of Paramont Directors is a copy of Exhibit G, the amendment that was added to the Pittston Plan to effect the merger of the Paramont Plans and the Pittston Plan. Quillen admitted that it was "very likely" that he signed the 11-18-88 Consent of Paramont Directors without reading Exhibit G and without understanding the terms of the merger.

Quillen stated that he saw and read an article regarding Paramont employees' pension benefits

changes contained in the December 1988 issue of the Paramont Pride (Exhibit 126) ("Paramont Pride Article"). He further admitted that he never sent out any correspondence to Paramont's employees telling them that the content of the Paramont Pride Article was wrong or telling them to disregard the content of the article.

On or about January 23, 1989, Quillen sent a memorandum to all Paramont employees addressing some concerns regarding the merger of the Paramont Plans into the Pittston Plan, (Exhibit 4) ("Quillen's 1-23-89 Memo"). In particular, Quillen stated that some employees had become concerned that their pension funds might be commingled with union pension funds. Quillen's 1-23-89 Memo states in part:

> Based on recent questions I have received, there is some inaccurate information circulating concerning the recent changes to the pension benefits. . . .
>
> Hopefully, these comments will clear up some of the misleading rumors, but if you have additional questions, please request your supervisor to contact the appropriate official for the correct answer.

Quillen's 1-23-89 Memo did not address the information contained in Robinette's 11-10-88 Letter or the Paramont Pride Article. Nor did Quillen's 1-23-89 Memo attempt to correct the information that Paramont employees

previously had received stating that Paramont employees would not receive credit for any of their years of service with Paramont prior to January 1, 1989, in the calculation of their benefits under the Pittston Plan.

Quillen testified that he left his employment with all Pittston-related entities in June 1989 and eventually went to work for Addington, Inc. Pittston eventually acquired Addington, and Quillen entered into negotiations to return to employment with Pittston in 1993. Quillen testified that as part of those negotiations, he received a couple of letters from Spindler including a letter dated January 5, 1993, (Exhibit 142) ("Spindler's 1-5-94 Letter"). In response to this letter, Quillen sent a letter to James Spurlock, Vice-President-Human Resources with the Pittston Coal Management Company, on February 8, 1994, (Exhibit 143) ("Quillen's 2-8-94 Letter"). Quillen's 2-8-94 Letter states in part: ". . . we had agreed that my prior service with Paramont, Pyxis and Addington would count toward calculation of my annual vacation benefit. . . ."

Quillen testified that some issues arose with regard to his employee benefits in 1997 and that, as a result of these issues, he sent a letter to Conley Parsley, Personnel and Compensation Manager for Pittston, on or about April 13, 1997, (Exhibit 541) ("Quillen's 4-13-97 Letter"). Quillen's 4-13-97 Letter states in part:

> My original hire date is October 16, 1976. I am eligible for Paramont retirement from 10/16/76 until 7/9/1986. In addition, I am eligible

> for Pittston retirement from 7/9/81 based on the five years of credit awarded per the attached. [Garges's letter]

After Quillen left employment with any Pittston-related companies, he filed suit against Pittston alleging a breach of his employment contract. In his Motion for Judgment filed in the Circuit Court of Russell County, (Exhibit 139) ("Motion for Judgment"), Quillen alleged:

> In 1986, Pittston Coal Company acquired Paramont. Immediately prior to the acquisition, [Quillen] was president of Paramont and he remained as such thereafter when it was confirmed to him by Pittston that he would receive credit in Pittston's pension plan for five years prior service in Paramont.

Quillen testified that he informed his counsel that the information in this paragraph was incorrect and his counsel subsequently filed a Second Amended Motion For Judgment, (Exhibit 146). Quillen testified that the Second Amended Motion For Judgment corrected this paragraph to state:

> In 1986, Pittston Coal Company acquired Paramont. Immediately prior to the acquisition, Mr. Quillen was president of Paramont. Mr. Quillen continued as president of Paramont at Pittston's request subsequent to its acquisition of Paramont after Pittston confirmed to Mr. Quillen that he would receive,

not from Pittston pension plan (the "Plan") but from Pittston directly, additional compensation upon retirement equal to what he would receive from the Plan had he been a Pittston employee for 5 years preceding his employment by Pittston. This was represented to have been accomplished by the purchase of an annuity by Pittston to cover the five years.

Quillen claimed on redirect that the reason he never put anything in writing to anyone correcting what he claimed were numerous misstatements regarding the pension benefits of Paramont employees after its acquisition by Pyxis is that he was instructed not to because of the then-current labor situation as Pittston anticipated and endured the 1989 United Mine Workers of America, ("UMWA"), strike. Instead, Quillen claimed that he continually complained orally about the inaccuracies.

Ratliff testified that, at or around the time of Pxyis's acquisition of Paramont in 1986, Quillen traveled to the various mine sites to notify employees about the acquisition. Ratliff testified that he was manager of safety for Paramont in 1986 and routinely traveled to the mine sites with Quillen to conduct required annual safety training. Ratliff testified that he heard Quillen tell Paramont workers during these mine site visits that their years with Paramont would count in the calculation of benefits under the Pittston Plan. Ratliff admitted, however, that Quillen did not discuss benefits on any of these mine site visits until sometime after Pyxis's acquisition of Paramont.

Ratliff also testified that he repeated Quillen's statements to numerous Paramont employees over the years. While Ratliff claimed on direct examination that he had responsibility to communicate with Paramont's workforce concerning employee benefits, he admitted on cross-examination that he did not work in the human resources department until sometime in late 1989 after he was an employee of Pyxis.

Ratliff also testified that Fox came to Paramont's Esserville offices in the fall of 1987 and met with 10 to 12 Paramont employees, including Ratliff, Robinette and Rhonda Miller, Paramont's Manager of Employee Benefits and Insurance, who were going to be transferred to Pyxis effective January 1, 1988. Ratliff testified that Fox went over the Pittston employee benefits package with the employees, including the Pittston retirement benefits. According to Ratliff, Fox wrote the formula used to calculate benefits under the Pittston Plan on a board. In the example that Fox used to work this calculation according to Ratliff, Fox included the employee's time with Paramont in the employee's Benefit Accrual Service, which she used to calculate benefits under the Pittston Plan. Ratliff also testified that he repeated the information given to him by Fox to numerous Paramont employees over the years.

Ratliff admitted that in September 1988 he and all Paramont employees received the 1988 Paramont Handbook, (Exhibit 2). Ratliff testified that he believed the information in the 1988 Paramont Handbook to be correct, and that the information had been approved by

Quillen before its distribution. According to the 1988 Paramont Handbook, Paramont's employees continued to be covered by the Paramont Plans, which provided a maximum fixed pension benefit of $350 per month at age 55 to an employee with 20 years of service. The 1988 Paramont Handbook made no mention of Paramont employees being covered under the Pittston Plan or of Paramont employees getting any credit for years of service worked with Paramont under the Pittston Plan.

Ratliff admitted that he received and read a copy of Robinette's 11-10-88 Letter in November 1988.

Ratliff testified that he never communicated to Robinette or anyone else that he thought the content of Robinette's 11-10-88 Letter was incorrect. He further testified that, to his knowledge, neither Quillen, nor anyone else, ever contacted Robinette to state that the contents of this letter were incorrect. Ratliff also testified that about a month after receiving Robinette's 11-10-88 Letter, he read the Parmont Pride Article explaining the merger of the Paramont Plans into the Pittston Plan, (Exhibit 26). Robinette testified that the Paramont Pride was distributed to all Paramont and Pyxis employees. Robinette also testified that, to his knowledge, Quillen reviewed the content of all editions of the Paramont Pride before it was distributed to the employees.

The content of the Paramont Pride Article was identical to Robinette's 11-10-88 Letter, in that it also states the following:

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On January 1, we will merge the [Paramont] plans into The Pension-Retirement Plan of The Pittston Company and its Subsidiaries. *On that date you will* automatically become a member of The Pittston Plan and *begin to earn pension accruals under The Pittston Plan. When you retire, your pension benefit under this plan will be the combination of what you earned under the Paramont . . . Plan prior to January 1, 1989, and what you earn under The Pittston Plan for service beyond January 1, 1989.*

. . .

Benefits Accrued Under The Paramont Plan Prior to January 1, 1989

When you retire, all pension benefits you have accrued under The Paramont Plan up to January 1, 1989, will be determined in accordance with the provisions of The Paramont Plan as in effect on December 31, 1988.

Benefit Accruals After January 1, 1989

Your pension benefits accrued from and after January 1, 1989, will be determined in accordance with the provisions of The Pittston Pension Plan. . . .

(Emphasis added). Ratliff testified that he never communicated to anyone that he thought the content of the Paramont Pride Article was incorrect. He further testified that, to his knowledge, neither Quillen, nor anyone else, ever contacted any of the Paramont employees or anyone else to say that the content of the Paramont Pride Article was incorrect.

Ratliff also testified that he participated in a meeting with all the employees of Pyxis's operating companies, including all Paramont employees, held at Clinch Valley College at the conclusion of the Pittston-UMWA strike in early 1990. At this meeting, Spindler, President of Pittston Coal Group, in response to a question raised by an audience member, stated that an employee's time with Paramont would count under the Pittston Plan, according to Ratliff. Ratliff admitted on cross-examination, however, that he could not recall if Spindler said how the years worked for Paramont would count.

Ratliff testified that he did not notice that the accrued benefit listed on his 1992 Annual Benefit Statement increased by more than $1,000 from his 1991 Annual Benefit Statement. Ratliff likewise testified that he did not notice that the accrued benefit listed on his 1993 Annual Benefit Statement decreased by almost $1,000 from the previous year's Annual Benefit Statement or that the accrued benefit listed on his 1996 Annual Benefit Statement increased by more than $1,000 from the previous year's.

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Ratliff testified that he relied on representations that all of his years of service with Parmont would be used to calculate his retirement benefits under the Pittston Plan. In particular, Ratliff testified that, if he had known that he would not receive credit for his time with Paramont in the calculation of his pension benefits under the Pittston Plan, he would have increased his contributions into Pittston's 401(k) plan from 5 percent to 15 percent a year. He also testified that, based on the misrepresentations regarding the calculation of his pension benefits, he chose to stay with Pittston-related companies rather than seek other employment. On cross-examination, however, Ratliff testified that it would have been unlikely that he could have found another job in the coal industry in the immediate area making the salary that he was making with Pittston.

Lawson testified that he worked for Paramont in July 1986 when it was acquired by Pyxis. Lawson transferred to Pyxis along with Ratliff and others effective January 1, 1988. Lawson was laid off from Pyxis effective February 15, 1988. According to Lawson, there were no changes in Paramont's employee benefits, including their pension benefits, when Paramont was acquired by Pyxis in 1986. In fact, Lawson testified that Quillen told him that there would be no change in the Paramont employees' benefits, including their retirement benefits, at the time of the acquisition by Pyxis.

Lawson testified that the first change in his benefits came when he transferred to Pyxis in 1988. Lawson testified that, prior to his transfer, he received a

memorandum from Quillen regarding his transfer. (Exhibit 54.) Attached to this memorandum was a chart comparing Paramont's employee benefits with Pyxis's. Under a category entitled pension benefit, this chart listed the Paramont benefit as:

> $350 per mo.
> @55 20 yr.
> 5 yr. vesting

The chart listed the Pyxis retirement benefit as:

> 2.1% Salary x
> *880 x yrs. service
> s/s offset
> 10 yr. vesting

The chart does not explain what is included in the years of service used to calculate benefits. Lawson testified that Quillen told him that his "Paramont time was going to count toward pension calculations in the Pittston Plan." Lawson did not testify as to when Quillen told him this or the circumstances surrounding this statement. Lawson also testified that he was told the same thing by Ratliff, Dennis Rasnick, who worked with Ratliff in Health and Safety, and Randy and Mike Clark, who were in charge of the strip and deep mine operations for Paramont.

Lawson testified that he also attended a meeting in the fall of 1987 with several other Paramont employees who were to be transferred to Pyxis effective January

1, 1988. During this meeting, according to Lawson, Quillen told those present that the Paramont Plans and the Pittston Plan were to be merged and that, when the plans merged, all of their Paramont time would be counted toward retirement in the Pittston Plan. Lawson admitted that Quillen did not state how the time would be counted or when the plans were to be merged. Lawson also testified that he did not remember whether Fox, Robinette or Miller were present at this meeting.

Lawson also testified that, while he was not a Paramont employee and did not see Robinette's 11-10-88 Letter when it was originally sent, he had seen and reviewed the letter in 1999. Lawson further admitted on cross-examination that the contents of Robinette's 11-10-88 Letter was consistent with what Quillen had told employees in 1987 and 1988. Lawson also testified that, since he was not a Paramont or Pyxis employee at the time, he did not attend the meeting at Clinch Valley College held after the settlement of the Pittston-UMWA strike in early 1990.

Lawson was hired by Holston Mining, ("Holston"), a Pyxis subsidiary, in 1990, and in 1991 he transferred to Heartland Resources, Inc., ("Heartland"). Before his transfer to Heartland, Lawson made a number of inquiries concerning his benefits if he transferred. In response, Lawson received a December 3, 1990, memorandum from Miller which states:

> This is to advise that your previous years of employment will be used in adjusting your

> hire date for benefit purposes. On July 18, 1994 you will regain your previous years of employment. At that time your adjusted hire date will be August 27, 1978. This adjusted date will be used for calculating vacation benefits.

(Exhibit 60) ("Miller's 12-3-90 Memo"). Lawson also received a letter from Miller explaining the company "policy regarding credit for prior service" (Exhibit 61), ("Miller's 4-30-91 Letter"). Miller's 4-30-91 Letter appears to explain how Lawson's adjusted service date would be calculated. The letter does not state what service date would be used to calculate Lawson's pension benefits under the Pittston Plan.

Lawson also received a June 24, 1991, memorandum from Miller explaining his employee benefits should he transfer to Heartland, (Exhibit 62) ("Miller's 6-24-91 Memo"). Miller's 6-24-91 Memo states in part:

> *Retirement* — All hours worked for the Pittston Company and its subsidiaries will count toward years of service for retirement benefits.

Lawson testified that the first time he realized that his years of service with Paramont prior to January 1, 1989, would not be included in the calculation of his pension benefits under the Pittston Plan was in 1999 after he received a November 18, 1999, letter from Spurlock, (Exhibit 73) ("Spurlock's 11-18-99 Letter").

Spurlock's 11-18-99 Letter explained that Pittston*881 had "discovered an error in the way that some of the [pension benefit] payments had been calculated" and stated that "Pittston must correct these pension payments on a going-forward basis."

In late 1999 or early 2000, Lawson requested and received an estimate of his pension benefits under the Pittston Plan from Parsley. Parsley's cover letter sending this estimate was dated January 10, 2000, (Exhibit 72) ("Lawson's 1-10-00 Pension Estimate"). Lawson's 1-10-00 Pension Estimate stated Lawson was eligible for early retirement and, if he took early retirement, his estimated monthly benefits, if he chose the single life annuity option, would be $485.63 per month. The estimate also stated that if Lawson retired on his Normal Retirement date of August 1, 2010, and assuming he chose the single life annuity option, his current accrued monthly benefits would be $971.26, which included $170 in Paramont Plans benefits. These estimates were based upon 10 years of Benefit Accrual Service.

Lawson testified that after receiving this estimate, he sent a letter to Vaughn Groves, a corporate attorney for Pittston Coal, demanding certain information and informing the company that he believed misrepresentations had been made to employees concerning how their retirement benefits would be calculated under the Pittston Plan. (Exhibit 74.) Lawson testified that he never received a response to this letter. Lawson also testified that he notified Pittston that he was alleging that misrepresentations had been made to

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Paramont employees concerning how their pension benefits would be calculated under the Pittston Plan by his responses on the 2001 and 2002 Pittston Company and Subsidiaries Annual Conduct Questionnaires. (Exhibits 75 and 76.)

Lawson also testified that while he was employed by Pittston and its subsidiaries, he did not seek any other employment because he believed that his benefits with Pittston "were comparable to anything else in the coal industry." On cross-examination, Lawson admitted that both Holston and Heartland paid "top dollar" in the industry.

Addington testified that he was an employee of Paramont at the time of its acquisition by Pyxis in 1986. Addington, who goes by the nickname "Brooks," testified that he was employed by Paramont from April 1, 1976, to January 1, 1989, when he transferred to Pyxis. Addington stated that he knew that the Paramont Plan and the benefits he was eligible for under the Paramont Plan did not change when Paramont was acquired by Pittston. Addington testified that Quillen first spoke to him about his benefits in the fall of 1988 before he transferred to Pyxis and told him that all his time with Paramont would be considered in the calculation of any Pittston benefits down the road. On cross-examination, however, Addington admitted that Quillen did not tell him how his years with Paramont would count under the Pittston Plan. Addington testified that he continued to work for Pyxis until he took early retirement on January 1, 1995.

Addington testified that he did not receive any pension calculation or estimate of his pension benefit at the time that he completed his paperwork in the fall of 1994 to take early retirement effective January 1, 1995. He stated that all he knew at that point was that his benefit under the Pittston Plan should be more than the maximum $350 a month under the Paramont Plans. He further testified that he never paid any attention to any of the Annual Benefit Statements he received.

After applying to take early retirement effective January 1, 1995, Addington received a letter from The Pittston Company Administrative Committee dated January 27, 1995, and signed by E.P. Cox, (Exhibit *882 95) ("Administrative Committee's 1-27-95 Letter"). The Administrative Committee's 1-27-95 Letter states:

> The Administrative Committee has approved your application for early retirement benefits under the provisions of the Company's Pension-Retirement Plan and has determined that you are eligible for a lifetime monthly actuarially reduced benefit of $2,140.43.
>
> . . .
>
> Please direct all questions and concerns regarding your benefit from the Pension-Retirement Plan to Conley Parsley at the Pittston Coal Group . . . .

Addington also testified that as a result of the benefits listed in this letter, his wife also chose to take early retirement three months after he retired.

Addington testified that he continued to receive monthly retirement benefits from the Pittston Plan of $2,140.43 for five years. Addington testified that in 1999 he received a call from Spurlock, Ratliff and Dale Kurtz, Manager of Pensions & Group Insurance for the Pittston Company, informing him that there had been an error in the calculation of his retirement benefits and that his correct monthly retirement benefits were $806. Subsequent to that conversation, Addington received a November 8, 1999, letter from Spurlock, (Exhibit 90) ("Spurlock's 11-8-99 Letter"). Spurlock's 11-8-99 Letter states:

> Pittston Coal Company has recently conducted a comprehensive review and audit of the benefits calculated under the Company's Pension-Retirement Plan. As a result, all retiree benefits have been recalculated.
>
> Throughout the recalculation process, our goal has been to ensure that every monthly benefit has been calculated according to the Plan rules, using accurate data. In some cases, discrepancies were found requiring an adjustment to the monthly retirement benefit.
>
> Unfortunately, I must inform you that it has been determined that the amount that you

have been receiving under the Pittston Pension-Retirement Plan has been incorrect. The original incorrect calculation has resulted in you being overpaid by the Plan. As explained below, your employment with Paramont from April 1, 1976, through December 31, 1988 was erroneously used when calculating your benefit under the Company's Pension-Retirement Plan. Such service with Paramont is recognized for Vesting Service, but is not recognized under the Pittston Pension-Retirement Plan for Benefit Accrual Service purposes.

Your benefit from the Paramont Pension Plan ($223.13) is added to your benefit under the terms of the Pittston Pension-Retirement Plan to determine your total retirement benefit. Your benefit under the Pension-Retirement Plan is determined using your salary and service after December 31, 1988 (prior to January 1, 1989 you were employed by Paramont, and covered under the Paramont Pension Plan). Unfortunately, when your benefit was originally calculated, service prior to January 1, 1989 was used to calculate your Pension-Retirement Plan benefit. In essence, your service from April 1, 1976 through December 31, 1988 was erroneously used to determine your benefit under both the Paramont Pension Plan and the Pittston Pension-Retirement Plan. As a result of this

> error, you have been overpaid and your monthly benefit will be reduced by $1,333.52 each month effective January 1, 2000. Your recalculated monthly benefit will be $806.91.

Addington testified that he currently receives $806.91 in monthly benefits from the Pittston Plan. He further testified that neither he nor his wife would have retired had he and she known that his monthly retirement benefits would be only $806.91.

Addington testified that he attended the meeting in January 1990 with all Pyxis employees at Clinch Valley College. Addington also testified that he recalled Spindler responding to a question and stating that the employee's retirement benefits under the Pittston Plan would include their time with Paramont. On cross-examination, Addington admitted that Spindler did not say how this time would be included under the Pittston Plan.

Blanton testified that he worked for Paramont from July 8, 1974, to December 13, 2002. Blanton testified that he learned of the acquisition of Paramont by Pyxis in 1986 from Quillen when he visited his mine site. In particular, Blanton stated that Quillen told him and the others present that nothing would change regarding their Paramont benefits after the acquisition.

Blanton also testified that he attended the January 1990 meeting a Clinch Valley College. Blanton stated that at this meeting Spindler, in response to a question

regarding whether employees would be given credit for their time with Paramont under the Pittston Plan, stated "nothing will change." Blanton admitted, however, that Spindler did not explain how benefits would be calculated under the Pittston Plan. Blanton testified that before this meeting, he had made some inquiries about obtaining another job, but that after this meeting he withdrew from consideration for those jobs. Blanton admitted that he received a copy of the 1988 Paramont Handbook, (Exhibit 2).

Meade testified that he worked for Paramont from 1977 to 1985. Meade also testified that he was hired by Pyxis in 1990 and continued to work with Pittston-affiliated companies until January 2001. Meade further testified that from approximately 1986 to 1990 he performed contract consulting work for Paramont. Meade stated that sometime in 1987 or 1988, as a result of his consulting work, he was present during a meeting with Quillen and other Paramont workers in the parking lot of Paramont's Esserville offices. At this meeting, according to Meade, Quillen told the employees that they would receive credit for their time worked with Paramont under the Pittston Plan. On cross-examination, however, Meade admitted that he could not remember exactly what Quillen said in this meeting other than that the Paramont Plan was being merged into the Pittston Plan. He admitted that he assumed that this meant that he would receive credit for his time with Paramont under the Pittston Plan.

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While Meade was not an employee of Paramont in 1988, his wife was. Meade admitted that it was likely that she had received Robinette's 11-10-88 Letter and that she had shared that letter with him.

Meade testified that in September 1990 he began working in the internal audit department of The Pittston Company at its Lebanon office. At the time that he accepted this position, Meade received a letter from Joseph G. Jandrasits, Manager of the Southern Audit Region for The Pittston Company, dated September 14, 1990, (Exhibit 43) ("Jandrasits's 9-14-90 Letter"). Jandrasits's 9-14-90 Letter states:

> Your prior employment with Paramont Mining Corporation, July 1977 to June 1985, . . . will be reviewed in order to determine if any of this time can be applied towards vacation or other applicable employee benefits.

Meade testified that, in response to this letter, he called Fox and asked what had been decided. According to Meade, Fox advised him that his time with Paramont would be included in determining his eligibility for certain employee benefits including retirement benefits under the Pittston Plan.

Meade testified that after he transferred to Pyxis in 1992, he received a copy of a December 21, 1992, memorandum from Eddie W. Neely, Vice-President of Finance for Pyxis, to Gary Sisk, Manager of Human

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Resources for Pyxis, (Exhibit 44) ("Neely's 12-21-92 Memo"). Neely's 12-21-92 Memo states:

> Please use this memo as your authority to record the benefit and vesting service date of the above referenced individual as October 28, 1981. This date reflects the agreement between Rick and myself at his re-hire date.

On cross-examination, Meade testified that he understood that Neely's 12-21-92 Memo was addressing the company's break in service rules. He further stated that he and Neely had no conversations about what, if any, effect this would have on his pension benefits.

Meade testified that he relied on statements that his time with Paramont would be counted in calculating his pension benefits under the Pittston Plan in that he chose not to seek other job opportunities. While Meade admitted that he had received a number of Annual Benefit Statements from the Pittston Plan over the years, he stated that he knew these statements were only estimates of his future retirement benefits, and that he did not take any action in reliance on the information contained in these statements.

Robinette also appeared and testified at trial. Robinette stated that he was the director of Human Resources with Paramont when Paramont was acquired by Pyxis in 1986. Robinette stated that, in this position, he reported directly to Quillen, Paramont's President. He also stated that he was the individual primarily

responsible for communicating with Paramont employees regarding employee benefits, including pension benefits. Robinette further stated that he served on the Administrative Committee of the Paramont Plans along with Quillen in 1986.

Robinette stated that he was transferred to Pyxis effective January 1, 1988. Robinette stated that after he transferred to Pyxis, he was responsible for human resources for all of Pyxis's various divisions, including Paramont. Robinette left his employment with Pyxis in November 1989.

Robinette testified that there were no changes in the Paramont employees' retirement benefits as a result of the acquisition of Paramont by Pyxis in 1986. He further testified that he never heard Quillen or anyone else tell any Paramont employees that there would be any change in their retirement benefits as a result of the acquisition.

Robinette testified that in 1987 he participated in a Benefits Review Committee established to review the benefits offered employees in each of Pyxis's divisions. He stated that he, Ray Williams, Lennon and Ed Cox served on this committee. Robinette testified that a number of the benefits changes that this committee considered were set out in a March 30, 1987, Memorandum from Lennon, (Exhibit 13) ("Lennon's 3-30-87 Memo"). Robinette testified that Lennon's 3-30-87 Memo accurately reflected that the committee considered a number of changes, but, as of March 30, 1987, the only change in the benefits of Paramont

employees that the committee was recommending was the implementation of a post-retirement medical plan.

Robinette testified that in the fall of 1987 he received a memorandum from Quillen dated September 2, 1987, (Exhibit 122) ("Quillen's 9-2-87 Memo"), advising Robinette that Quillen was considering transferring 15 employees, including Robinette, to Pyxis as part of the "Pyxis/Paramont administrative consolidation." Quillen's 9-2-87 Memo asked Robinette to prepare a benefit package summary for these employees. Robinette stated that he prepared a benefit comparison and returned it to Quillen for his review attached to a September 16, 1987, memorandum, (Exhibit 123) ("Robinette's 9-16-87 Memo").

Robinette stated that Quillen never told him that he had incorrectly stated that the employees' years of service with Paramont would count only for vesting purposes. Instead, Robinette stated, Quillen distributed the two-page chart to all the employees who were transferring to Pyxis along with a cover memorandum identical to the one sent to Lawson, (Exhibit 54).

Robinette also specifically testified that he was never told, and that he never told anyone who was transferring to Pyxis, that they would receive credit for their years of service with Paramont in their Benefit Accrual Service used to calculate benefits under the Pittston Plan. Robinette testified that he later attended a meeting with all the transferring Paramont employees and Fox at Paramont's Esserville offices. Robinette stated that he

does not recall anyone at that meeting telling the employees that their years of service with Paramont would be counted toward the Benefit Accrual Service in calculating benefits under the Pittston Plan. He stated that after the meeting he had the same understanding as before, that their years of service with Paramont would count for vesting purposes under the Pittston Plan.

Robinette also testified that in 1988 Pyxis began considering merging the Paramont Plans into the Pittston Plan because the number of employees participating in the Paramont Plan for salaried employees had fallen below a required minimum participation level. As a result of these discussions, Robinette sent a memorandum dated August 24, 1988, to Quillen, (Exhibit 126) ("Robinette's 8-24-88 Memo"). Robinette's 8-24-88 Memo stated in part:

> The more favored approach is to merge these salaried participants into the Pittston Plan. Since the accrued benefits payable under the Paramont Plan on December 31 of this year cannot be reduced, employees would still be entitled to this benefit as early as age 55 if elected. In addition, for benefit service under the Pittston Plan beginning January 1 to retirement, benefits payable under this plan would be substantially larger than [those] under the Paramont Plan. . . .

Robinette also testified that after receiving this memorandum, Quillen never told him that he had incorrectly stated that, if the plans merged, Paramont employees would not receive credit for their years of service with Paramont in their Benefit Accrual Service used to calculate benefits under the Pittston Plan.

Robinette testified that after the decision was made to merge the plans, he sent a letter dated November 10, 1988, to all Paramont employees, (Exhibit 3). Robinette also specifically testified that Quillen reviewed this letter before it was distributed to Paramont employees. Robinette further testified that neither Quillen nor anyone else ever told him that any of the information contained in this letter was incorrect. Robinette testified that he never told any Paramont employees that they would receive credit for their years of service with Paramont for any purpose under the Pittston Plan other than for vesting purposes. Robinette also stated that neither Quillen nor anyone else ever told him that the information contained in the Paramont Pride Article, (Exhibit 126), was incorrect. Robinette further stated that he never heard Quillen or anyone else ever tell any Paramont employee that he would get credit for his years of service with Paramont in the calculation of his benefits under the Pittston Plan. Robinette also testified that he did not consider himself a fiduciary under the Pittston Plan because he had no responsibility for plan assets, plan administration or plan documents.

Rhonda Miller Perkins, ("Miller"), also testified at trial. At the time of Pyxis's acquisition of Paramont in

1986, Miller worked in Paramont's human resources department assisting Robinette. Miller testified that at the time of the acquisition of Paramont by Pyxis, she did not hear Quillen or anyone else tell any Paramont employees that their pension benefits would change. In fact, Miller testified that, to her knowledge, Paramont employees' pension benefits did not change based on Pyxis's acquisition of Paramont.

Miller testified that in the fall of 1987 she was notified that she was being transferred to Pyxis effective January 1, 1988. Before this transfer occurred, Miller testified, she attended a meeting, along with other employees who were transferring to Pyxis effective January 1, 1988, at which Fox explained the change in their employee benefits. Miller testified that Fox told the employees present that their pension benefits earned under the Paramont Plans would be frozen effective January 1, 1988, and that, as of that date, they would begin to earn benefits under the Pittston Plan. Miller stated that Fox did tell those present that their years of service with Paramont would count for vesting purposes under the Pittston Plan.

Miller also testified that as a result of the merger of the Paramont Plan and the Pittston Plan in the fall of 1988, all Paramont employees' pension benefits under the Paramont Plans were frozen as of January 1, 1989, and they would begin to earn benefits under the Pittston Plan from that day forward. Miller also stated that she never told any Paramont employee that they would receive credit for their years of service with Paramont

in the calculation of their benefits under the Pittston Plan.

Miller testified that in December 1988 she was the editor of the Paramont Pride. She also testified that, as editor, she submitted all articles to Quillen for his review before inclusion in the Paramont Pride. Miller specifically testified that Quillen reviewed the Paramont Pride Article, (Exhibit 126), before it was published, and that neither Quillen nor anyone else ever told her that the information contained in this article was inaccurate. Miller further testified that in December 1988, the Paramont Pride was distributed to all Paramont, Motivation and Pyxis employees by mailing it to their home address.

Miller testified that in April 1990 she served as Paramont's Manager of Employee Benefits and Insurance. In this role, she sent a letter to all Paramont employees with a benefit statement for the Paramont Production Incentive Plan, (Exhibit 8) ("Miller's 4-10-90 Letter"). Miller's 4-10-90 Letter states in part:

> Attached you will find your Production Incentive Plan benefit statement for 1989.... Please remember this is just one portion of your retirement plan....
>
> You will receive a statement on the other two parts of your pension retirement plan in early May as well as a sample form showing how your retirement benefit is calculated.

These two parts consist of your pension benefit from the Paramont Plan through December 31, 1988 and your pension benefit from the Pittston Plan from January 1, 1989. You will recall that the Paramont Defined Benefit Plan was frozen on December 31, 1988. All vested Paramont employees will receive a fixed amount calculated as of this date upon retirement. Everyone employed beginning January 1, 1989 will also receive a pension-retirement benefit from the Pittston Plan if vested. Employees vested in the Paramont Plan are also vested in the Pittston Plan. . . .

We all realize that pension-retirement plans are not easily understood. We try to provide you with as much information on the plans as possible. A summary plan description booklet which explains the Pittston Pension-Retirement Plan will be available soon and will be mailed to you. In the meantime, if you have specific questions, please do not hesitate to contact the Employee Benefits Department.

Miller also testified that she helped prepare and sent a May 15, 1990, letter from Scott Perkins, ("Perkins"), then the President of Paramont, to all Paramont employees, (Exhibit 7) ("Perkins's 5-15-90 Letter"). Perkins's 5-15-90 Letter states in part:

Many of you have inquired as to the value of your retirement account under the Pittston

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Pension Retirement Plan and the frozen portion of your Paramont Retirement Plan. The enclosed summary outlines your normal retirement date, estimated monthly retirement pension and estimated social security benefit. It also lists the amount of your fixed Paramont benefit which is included in your estimated monthly retirement pension.

Enclosed also is a sample calculation of how one's pension benefit may be estimated. The formula for calculating your actual pension benefit is not quite this simple. Perhaps, however, this example may give you a better understanding of the process.

Please remember that your Pension Retirement Plan is guaranteed upon vesting. These particular amounts are not guaranteed. They are projections which will change with your length of service, wage changes, overtime, etc. If you have any additional questions, please don't hesitate to contact the Employee Benefits Department.

Miller testified that she prepared the sample pension calculation attached to the letter in accordance with her understanding of how the Paramont employees would accrue benefits under the Pittston Plan. This attached sample calculation stated:

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Assume one retires at age 63 . . . with 8 years of service under the Pittston Pension-Retirement Plan. Prior 14 years of service were with Paramont and benefit was frozen at 12-31-88.

Assume the Average Annual Salary for 36 consecutive months is $52,500.

Covered Compensation Value as established by Social Security guidelines for someone born in 1927 is $21,000.

Social Security Offset Calculation

$21,000 x .0055 x 8 years = $924.00

Life Annuity Calculation

$52,000 x .021 x 8 years = $8,820

$8,820-$924 = $7,896/12 = $658 Monthly Pension Benefit

Because this person chose to retire at 63, the monthly pension benefit is reduced by 10 percent or $658 x .90 = 592.20

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Monthly pension benefit under Pittston Plan	$592.20
Frozen pension benefit under Paramont Plan	214.38
TOTAL MONTHLY PENSION BENEFIT	$806.58

Miller testified that the hypothetical individual used in this sample calculation had only eight years of Benefit Accrual Service under the Pittston Plan, but had worked a total of 22 years for Paramont.

Miller testified that after Robinette left Pyxis, she, on occasion, would perform retirement benefits calculations for employees. Miller stated that she did not specifically remember preparing any such calculation for Addington, but that, if she did prepare such a calculation, she would not have included his years of service with Paramont prior to January 1, 1989, in calculating his benefits under the Pittston Plan. Miller also testified that she never told Lawson that his years with Paramont would be included in determining his Benefit Accrual Service under the Pittston Plan. Miller testified that she prepared and sent Exhibit 62, Miller's 6-24-91 Memo, to Lawson on June 24, 1991.

Fox also testified at trial. Fox testified that she worked with the Pittston Company from sometime in the 1970s until she left her employment in 1994. At the time she left her employment, she was the Employee Benefits Manager of Pittston. Prior to that time, she had been the Assistant Employee Benefits Manager.

Fox testified that, as Employee Benefits Manager for Pittston, she had some administrative responsibilities regarding the Pittston Plan, which included recordkeeping, calculations and processing payments. Fox stated that she was never a member of the Administrative Committee of the Pittston Plan. Fox testified that she had no authority to change the terms of the Pittston Plan and no authority to change how employees' Benefit Accrual Service was calculated under the Pittston Plan. She stated that if she had questions regarding the plan language, she took those questions to her supervisor, Ed Cox, who was a member of the Administrative Committee of the Pittston Plan.

Fox testified that she did not recall making a specific trip to Paramont's Esserville offices in 1987 to explain Pittston's employee benefits to a group of Paramont employees who were transferring to Pyxis effective January 1, 1988, although she admitted that she did travel a lot during that time period to explain Pittston's employee saving investment plan.

Fox stated that she never told any Paramont employees, and she never heard anyone else ever tell any Paramont employees, that their years of service with Paramont prior to January 1, 1989, would be used to calculate their retirement benefits under the Pittston Plan.

Fox admitted that she sent a memorandum to Larry Miller dated May 30, 1991, (Exhibit 302, p. 14) ("Fox's 5-30-91 Memo"), regarding the calculation of his benefit

service under the Pittston Plan. Fox's 5-30-91 Memo states that Miller's time with Paramont prior to January 1, 1989, would be included in his Benefit Accrual Service under the Pittston Plan. Despite the language of Fox's 5-30-91 Memo, Fox testified that Miller's Benefit Accrual Service under the terms of the Pittston Plan would not include his years of service with Paramont.

Fox testified that during her tenure at Pittston, she assisted in the production of annual employee benefits statements. Fox stated that the actual statements were produced by an independent firm named Kwasha Lipton from data provided to it by Pittston's various operating groups. Fox testified that microfiche copies were kept of all the data provided to Kwasha Lipton, and that Exhibit 534 was a copy of some of these microfiche copies. Fox testified that in gathering this data, Pittston used location codes to indicate which Pittston-related company the employees worked for. Fox testified that Exhibit 166 contained an explanation of these codes. She stated that "C" stood for coal-related salaried employees, "E" stood for coal-related hourly employees, "H" stood for Pyxis, "I" stood for Paramont, "J" stood for Motivation, "K" stood for Holston and "M" stood for Heartland.

Spurlock also testified at trial. Spurlock testified that he was the Vice President of Human Resources for Brink's US, a subsidiary of the Brink's Company. Spurlock stated that he has held this position since 1993 and that, before that date, he was the Vice President of Human Resources for Pittston Coal Management

Company from 1987. Spurlock stated that he worked from 1986 to 1987 as director of labor relations for the Pittston Coal group companies. Spurlock stated that in 1994 his department began handling some of the administration of employee benefits for Pittston's nonunion coal companies. At that time, Spurlock stated that he had to become familiar with the benefits provided to Paramont employees under the Pittston Plan. Spurlock stated that it was his understanding that, under the Pittston Plan, Paramont employees were entitled to an accrued frozen benefit calculated under the Paramont Plans effective December 31, 1988, and also began receiving credit for benefits under the Pittston Plan effective January 1, 1989.

Spurlock testified that he never instructed anyone working for him to give Paramont employees credit for their time with Paramont prior to January 1, 1989, in the calculation of benefits under the Pittston Plan. Spurlock stated that he first became aware that some of Pittston's annual employee benefit statements had contained inaccurate information regarding pension benefits in late 1998. Spurlock said he learned of the problem when his office was asked to perform a pension benefit calculation for an employee named David McCarty and the calculation performed by his office was different from the information McCarty had received in his annual benefit statements. Spurlock testified that in 1999 or 2000 Pittston undertook an audit of all pension benefits calculations and that, through this audit, the error in Addington's pension benefits calculation was discovered. As a result of this audit, Spurlock stated that

he sent a letter dated November 18, 1999, (Exhibit 73) ("Spurlock's 11-18-99 Letter"), to the employees of all Pittston-affiliated companies. Spurlock's 11-18-99 Letter states in part:

> During a review of some individual retirement payments, we discovered an error in the way that some of the payments had been calculated. This prompted an analysis of all our pension calculations. We have determined that certain monthly retirement benefits paid to Pittston Coal Company retirees were miscalculated. Unfortunately, errors occurred over a period of years, and among many Coal Companies. Some of these retirees have been receiving monthly pension checks that are too high and others are receiving checks that are too low. The majority of our retirees' benefits will remain unchanged, or will increase. Of those retirees affected, the average increase in benefits will be approximately $16 per month with the average decrease being approximately $22 per month. You may have heard that some retirees will see a drastic decrease in their benefit amount. While a handful of retirees will see a rather large decrease in their benefit, this is the exception, and not the norm. There will be far more benefit increases, and some retirees will receive sizeable retroactive payments. . . .

> Pittston must correct these pension payments on a going-forward basis. Our pension plan is governed by the Internal Revenue Code and in order to remain in compliance with the rules governing the Plan, as well as to fulfill the Company's responsibilities to all of the Plan participants, the Plan must operate according to its established rules. . . .

(Exhibit 73).

Spurlock also testified that, as a result of the audit of pension benefit calculations, errors in annual employee benefits statements also were discovered. As a result, he and Parsley began investigating why inaccurate information had been included in the annual employee benefit statements. As a result of these errors, Pittston decided to no longer send annual employee benefit statements in 1999. Also, as a result of these errors, Pittston went back and recalculated estimated retirement benefits for more than 700 prior and current Pittston employees. Spurlock testified that all current and former Paramont employees were notified by letter from him dated September 25, 2000, (Exhibit 45) ("Spurlock's 9-25-00 Letter"), that they would be provided with new estimated pension calculations. Attached to Spurlock's 9-25-00 Letter was a September 23, 2000, letter from Robert A. McGregor, Paramont's Vice President, explaining how Paramont employees' retirement benefits were calculated under the Pittston Plan. Also attached to Spurlock's 9-25-00 Letter was a May 15, 1990, letter from Perkins, President of Paramont.

Spurlock testified that these new estimated pension calculations were provided to the current and former Paramont employees in November 2000. Spurlock stated that he sent a letter dated November 30, 2000, (Exhibit 46) ("Spurlock's 11-30-00 Letter"), along with a November 30, 2000 letter from McGregor, to each former Paramont employee with the pension benefits estimate attached. Spurlock stated that McGregor's letter with a pension benefits estimate attached went to all current Paramont employees. Spurlock testified that there were actually two versions of McGregor's 11-30-00 letter, one sent if the employee's 1998 annual benefits statement had been correct and one sent if the employee's 1998 annual benefits statement had been incorrect.

In preparation for his testimony, Spurlock stated that he reviewed each page of Exhibit 534, and that Exhibits 704 and 711 contained an accurate summary of the information contained in Exhibit 534. Spurlock stated that his review of the records contained in Exhibit 534 showed that the plaintiffs in this case had received a total of 836 annual employee benefits statements from 1988 to 1998. Of these 836 statements, only 67 of them, or 8 percent, contained incorrect information. Of the original 132 plaintiffs in this case, only 16 had received one or more incorrect annual employee benefits statement.

Lennon also testified by deposition and live at trial. Lennon stated that he was currently Vice President of Human Resources and Administration for the Brink's Company. Lennon testified that he started work with

Pittston in 1977 as director of risk management, insurance and employee benefits. Lennon testified that in 1986 he was Vice President of Human Resources and Administration for Pittston, the same job he currently holds. Lennon testified that he was familiar with the Paramont Plans at the time that Pyxis acquired Paramont in 1986, and that no changes were made in the Paramont employee benefits at the time of the acquisition. He further testified that he never told anyone that there would be any changes in Paramont employee benefits as a result of the merger.

Lennon also testified that he was on the Administrative Committee of the Pittston Plan at the time the decision was made to merge the Paramont Plans into the Pittston Plan. Lennon testified that, pursuant to the terms of the merger of the plans, Paramont's employees would be eligible to receive the benefit they had accrued under the Paramont Plans as of December 31, 1988, and would be eligible to begin accruing benefits under the Pittston Plan effective January 1, 1989. Lennon testified that he never communicated to anyone that the terms of the merger were different, nor did he authorize anyone to communicate any different terms.

Lennon testified that he participated in the drafting of Robinette's 11-10-88 Letter. Lennon further testified that Robinette's 11-10-88 Letter accurately set out his understanding of the merger's effect on Paramont employees' retirement benefits. Lennon stated that he never told any Paramont employees anything inconsistent with Robinette's 11-10-88 Letter, and that

he never told anyone else to tell Paramont employees anything inconsistent with Robinette's 11-10-88 Letter. Lennon specifically testified that he never authorized Quillen to tell Paramont employees anything inconsistent with Robinette's 11-10-88 Letter. Lennon also testified that Quillen had no discretionary authority with regard to the Pittston Plan, did not have any authority to change the terms of the Pittston Plan and did not have any authority to grant benefits inconsistent with the terms of the Plan. Lennon also testified that Neeley had no responsibility to communicate with employees about the Pittston Plan. Lennon testified that Fox, Robinette and Miller had no authority to grant benefits under the Pittston Plan beyond those described in the plan.

Lennon testified that, after the merger of the Paramont Plans into the Pittston Plan, the administration of the Pittston Plan was "fairly decentralized" with local human resource offices responsible for most of the direct contact with employees concerning their pension benefits, including answering questions and providing estimates of benefits and benefit calculations. Lennon testified that the administration of the Pittston Plan remained decentralized until some time in the late 1990s when Pittston realized that errors were being made by the local human resources offices and decided to transfer the administration of the Pittston Plan back to its corporate offices.

Lennon testified that he never instructed anyone to give any incorrect information to Kwasha Lipton for use in preparing employees' annual benefits statements. He

further testified that he never instructed anyone to use a date before January 1, 1989, for the Benefit Service Accrual date for any Paramont employee under the Pittston Plan.

Lennon testified that in the late 1990s Pittston undertook a comprehensive audit of every pension benefits calculation ever performed and forwarded to the Pittston Plan trustees for payment. Lennon stated that, during this audit process, Spurlock informed him that some of the annual employee benefit statements also had contained inaccurate information. Lennon testified that before Spurlock came to him with this information, he was not aware of incorrect Benefit Service Accrual dates being used to calculate pension benefit estimates for Paramont employees.

Lennon testified that under the terms of Pittston's 401(k) plan, highly compensated employees were limited to contributions of only five percent of their salary per year from the early 1980s forward so that the plan could meet applicable Internal Revenue Service, ("IRS"), standards.

Lennon also testified that, prior to late 1999 or early 2000, most of the day-to-day administration of the Pittston Plan was handled by the subsidiaries' local human resources offices and their personnel. He stated that if employees had questions about their retirement benefits, they were instructed to contact their local human resources office. He further stated that the Administrative Committee approved of this procedure.

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Lennon testified that from 1986 to 1989 the administrator of the Pittston Plan was the Pittston Company and that the Pittston Company delegated this function to the Administrative Committee. Lennon also testified that in the fall of 1988 the Pittston Plan was amended to allow the Administrative Committee to amend the plan. Lennon further testified that the merger of the Paramont Plans into the Pittston Plan was accomplished by an amendment to the Pittston Plan approved by the Administrative Committee. Lennon testified that no one with Pittston or any of its subsidiaries had the authority grant benefits to a plan participant that were inconsistent with the language of the plan. He further testified that the only way benefits could be granted contrary to the language of the plan was for the Administrative*892 Committee to formally amend the plan.

Lennon testified that under the Paramont Plans, all Paramont employees were automatically participants in the Paramont Plans, and that the employees did not make any contributions into the plans. Lennon also testified that when various Paramont employees were transferred to Pittston Plan participating companies, they automatically became participants in the Pittston Plan, they had no election to make and no contribution was required. Lennon further testified that when the Paramont Plans merged into the Pittston Plan on January 1, 1989, all Paramont employees automatically became participants under the Pittston Plan; they had no election to make and no contribution was required.

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Perkins also testified at trial. Perkins testified that he began work with Pyxis in 1987. In 1988, Perkins became General Manager of Operations for Paramont and, in 1989, Perkins became Vice President of Pyxis. Perkins testified that, after the merger of the Paramont Plans into the Pittston Plan, he understood that Paramont employees would receive the amount of benefits which they had accrued under the Paramont Plans up until the date of the merger, and that after the merger, they would begin to accrue benefits under the Pittston Plan. Perkins stated that he gained this understanding of the Paramont retirement benefits from various discussions and meetings. Perkins stated that he never heard Quillen or Ratliff tell anyone anything inconsistent with his understanding of how the Plan worked.

Perkins stated that Miller drafted and he reviewed and sent out a May 15, 1990, letter to all Paramont employees, (Exhibit 7) ("Perkins's 5-15-90 Letter"), with a sample calculation showing how their retirement benefits would be calculated. Perkins testified that after this letter was distributed, no one told him that his letter or the sample calculation was wrong. Perkins stated that he worked with Ratliff on a daily basis at that time.

Parsley also testified at trial. Parsley worked with Pittston in its Lebanon offices from August 1983 to March of 2003. Parsley stated that for the last few years he worked for Pittston, his title was Personnel and Compensation Manager. He stated that he assumed some administrative duties with regard to the Pittston Plan

beginning in 1994, including providing calculation of retirement benefits on occasion. Parsley stated that he was never on the Administrative Committee of the Pittston Plan and that he had no authority to change the terms of the Pittston Plan.

Parsley stated that he performed a pension benefit calculation for Addington sometime in late 1994 or early 1995. After doing the calculation, Parsley said he sent the calculation to Pittston's corporate headquarters for approval, which was the procedure. He stated that he was notified by Pittston's corporate office to change Addington's Benefit Service date to January 1, 1989, and recalculate his benefits. Parsley testified that he changed Addington's Benefit Service date to January 1, 1989, in one field of the computer program, but did not change the date in another field, and that when he recalculated the benefits, this error led to Addington's retirement benefits being incorrectly calculated by including his years of service with Paramont prior to January 1, 1989, (Exhibit 419) ("Addington's 1-9-95 Pension Calculation"). Parsley testified that, by providing this inaccurate calculation to Addington, he did not mean to grant him credit toward calculation of his retirement benefit for any years of service not provided for by the Pittston Plan.

Parsley testified that he first learned that incorrect information had been provided in some of Pittston's annual employee*893 benefit statements when McCarty informed him that a pension calculation Parsley had provided to him was different from his annual benefit

statement. Parsley stated that he discovered that the wrong Benefit Service Accrual date had been used to calculate the estimated pension benefits listed on McCarty's annual benefit statement. Parsley said that he also discovered errors in other annual benefit statements and so he notified Pittston's corporate headquarters of the problems he had found.

Ralph Dado also testified at trial. Dado testified that he worked for Pittston-affiliated companies from 1972 until he retired in 1999. He became Vice President for Operations of Pyxis in 1992. In this role, Dado said that he attended numerous meetings at job sites, at which a number of items were discussed with Paramont employees, including pension benefits. Dado stated that he had been present when Ratliff had explained how the Paramont employees' pension would work after the merger of the Paramont Plans into the Pittston Plan. Dado testified that he had heard Ratliff tell employees that, under the Pittston Plan, they would receive the benefit they had accrued under the Paramont Plans at the time of the merger and would begin earning benefits under the Pittston Plan from the time of the merger forward. Dado specifically testified that he never heard Ratliff or anyone else tell any Paramont employee that they would receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of their benefits under the Pittston Plan.

Tracey Rennie testified by deposition. According to Rennie she worked as a benefits analyst for Pittston from 1999 to October 2000. While she worked for Pittston, her

legal married name was Tracey Brown. Rennie stated that she was hired to recalculate pension benefits for employees under an audit that Pittston was performing. Rennie said that she was told that the audit was being conducted because many of the local human resource offices had made errors in the calculation of benefits. Rennie reported to Dale Kurtz. Rennie stated that she remembered that many employees' benefits had to be calculated a number of times based on discrepancies in dates of service. Rennie also remembered that there were issues concerning the years of service that would be included in the calculation of benefits for Paramont employees.

Paul W. Douglas testified by way of deposition. Douglas stated that he had served as Chairman of the Board of Directors and Chief Executive Office of The Pittston Company from 1984 until his retirement in 1991. Douglas testified that he met with Quillen around the time of Pyxis's acquisition of Paramont, but they did not have any discussions regarding Paramont employees receiving credit for their service with Paramont in the calculation of benefits under the Pittston Plan. Douglas testified that Paramont was the first significant nonunion coal operation that Pittston acquired.

Farrell also testified by way of deposition Farrell testified that he retired from his position as Chairman and Chief Executive Officer of The Pittston Company in 1998. Farrell testified that he worked for Pittston for 14 years. He began his work with Pittston in 1984 as senior or executive vice president. Farrell stated that

he became President of Pittston in 1990 and Chairman and Chief Executive Officer in 1991. Farrell testified that he first met Quillen near the time that he was negotiating the acquisition of Paramont by Pyxis. Farrell stated that Quillen did not participate in these discussions because he was not a significant equity owner of Paramont. Farrell stated that, prior to Pyxis's *894 acquisition of Paramont, Pittston did not have any significant nonunion operations, and Pittston's desire to expand into nonunion coal operations was at least part of the motivation for Pyxis's acquisition of Paramont.

Farrell testified that he never told Quillen, and that he never heard Douglas tell Quillen, that after Pyxis's acquisition of Paramont, Pittston would grant Paramont employees Benefit Accrual Service credit under the Pittston Plan for their years of service with Paramont before the Paramont Plans were merged into the Pittston Plan. Farrell also testified that he never made such a representation to anyone at Paramont. In fact, Farrell testified that he specifically told Quillen that Paramont employees would not receive Benefit Accrual Service credit under the Pittston Plan for their years of service with Paramont before the plans were merged.

II. ANALYSIS

As stated above, the only claim remaining before the court is the plaintiffs' claim that the defendants breached their fiduciary duties by providing plaintiffs inaccurate and untruthful information about the inclusion of their years of service with Paramont prior to January 1, 1989,

in the calculation of their retirement benefits under the Pittston Plan. Plaintiffs bring this claim under ERISA § 502(a)(3), which provides:

> A civil action may be brought-
>
> (3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C.A. § 1132(a)(3) (West 1999).

In *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), the Supreme Court recognized the rights of individual participants to sue a person acting as a fiduciary under an ERISA plan for breach of fiduciary duty under § 502(a)(3). To establish such a claim, a plaintiff must show 1) that a defendant was a fiduciary of the ERISA plan; 2) that a defendant breached its fiduciary responsibilities under the plan; and 3) that the participant is in need of injunctive or "other appropriate equitable relief" to remedy the breach. *See Blair v. Young Phillips Corp.*, 235 F.Supp.2d 465, 470 (M.D.N.C.2002) (citing *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 379-80 (4th Cir.2001)).[1]

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1. At least one other circuit has stated the elements of a breach of fiduciary duty claim as "(1) the defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation (Cont'd)

Thus, to determine whether these plaintiffs have proven their breach of fiduciary duty claim entitling them to recovery under § 502(a)(3), the court must answer the following questions:

1. Did anyone provide these plaintiffs with inaccurate and untruthful information concerning their benefits under the Pittston Plan?

2. If someone did provide these plaintiffs with inaccurate and untruthful information concerning their benefits under the Pittston Plan, was that person acting as a "fiduciary" under the Pittston Plan? and

3. If someone acting as a fiduciary provided these plaintiffs with inaccurate and untruthful information concerning their benefits under the Pittston Plan, is

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(Cont'd)

on the part of the defendant; (3) the materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation." *Daniels v. Thomas & Betts Corp.*, 263 F3d 66, 73 (3rd Cir.2001). It does not appear that the Fourth Circuit has specifically ruled that a plaintiff must prove materiality or detrimental reliance to prevail on a breach of fiduciary duty claim based on a misrepresentation. Nonetheless, it would appear that these elements should be taken into consideration in determining whether granting relief to a particular plaintiff would be "appropriate."

injunctive or "other appropriate equitable relief" needed?

The court will address each of these questions in turn, starting with the issue of whether anyone provided these plaintiffs with inaccurate and untruthful information concerning their benefits under the Pittston Plan.

The Court in *Varity* recognized that a fiduciary's intentional misrepresentations would breach the duty owed plan beneficiaries. *See Varity,* 516 U.S. at 506, 116 S.Ct. 1065. It is important to note, however, that the Court, in reaching its decision in *Varity,* specifically stated that it was not questioning the lower courts' "findings of serious deception." *Varity,* 516 U.S. at 492, 116 S.Ct. 1065. Nonetheless, the Court stated, "To participate knowingly and significantly in deceiving a plan's beneficiaries . . . is not to act 'solely in the interest of the participants and beneficiaries.' " *Varity,* 516 U.S. at 506, 116 S.Ct. 1065 (quoting ERISA § 404(a)(1), 29 U.S.C.A. § 1104(a)(1) (West 1999)); *see also Harte v. Bethlehem Steel Corp.*, 214 F.3d 446, 452 (3rd Cir.2000) (ERISA administrators have a fiduciary obligation "not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures") (internal quotation marks omitted); *Fischer v. Phila. Elec. Co.*, 994 F.2d 130, 135 (3rd Cir.1993) ("when a plan administrator speaks, it must speak truthfully"); *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 251 (6th Cir.1992) (stating that an employer violates its fiduciary duties by misleading employees regarding the availability of participation in a plan);

Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir.1983) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [29 U.S.C. § 1104]").

While the Supreme Court in *Varity* held only that a fiduciary's intentional, knowing deception would breach the duty owed plan beneficiaries, courts, including the Fourth Circuit, have since found breaches of fiduciary duty based on much less culpable misrepresentations or, even, a failure to communicate material information. *See Griggs*, 237 F.3d at 380-84. In *Griggs* the Fourth Circuit recognized,

> a fiduciary's responsibility when communicating with the beneficiary encompasses more than merely a duty to refrain from intentionally misleading a beneficiary. ERISA administrators have a fiduciary obligation "not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures."

Griggs, 237 F.3d at 380 (quoting *Harte*, 214 F.3d at 452).

In *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 656 (4th Cir.1996) (citing *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport Inc.*, 472 U.S. 559, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985)), the Fourth Circuit recognized that the fiduciary

responsibility provisions under ERISA invoke the common law of trusts, including the trustee's common law duty to give beneficiaries complete and accurate information as to the nature and amount of the trust property upon request.

Throughout this case, the plaintiffs have represented to the court that they were told on numerous occasions by different Pittston representatives that they would receive credit for their years of service with Paramont prior to January 1, 1989, in calculating their benefits under the Pittston Plan. In fact, plaintiffs have asserted that the defendants were involved in a purposeful scheme to deceive Paramont employees into believing that their pension benefits under the Pittston Plan were more generous than they, in fact, were. According to the plaintiffs, this scheme was undertaken by the defendants in an effort to convince Paramont employees to remain nonunion after Paramont's acquisition by Pyxis.

After hearing the evidence at trial, however, it is now evident to the court that, if any such scheme ever existed, the defendants failed miserably in its execution. Of these five plaintiffs, only four were employees of Paramont at the time of its acquisition by Pyxis. Of those four, three-Addington, Blanton and Lawson-all admitted that they knew that there was no change in their employee benefits, including their pension benefits, as a result of Pyxis's acquisition of Paramont. The fourth, Ratliff, testified that Quillen told him and others that they would receive credit for their years of work with Paramont in the calculation of their retirement benefits under the

Pittston Plan some time at or around Pyxis's acquisition of Paramont. Upon further questioning, however, Ratliff admitted that Quillen did not make these statements until some time after Pyxis's acquisition of Paramont. Ratliff further admitted that he received a copy of the 1988 Paramont Handbook in September 1988, and that he believed the information contained in the handbook to be accurate. The evidence also established that the 1988 Paramont Handbook was distributed to all Paramont employees. According to the 1988 Paramont Handbook, Paramont employees at that time were covered for pension benefits by only the Paramont Plans.

Furthermore, the uncontradicted evidence shows that, in the fall of 1988, prior to the merger of the Paramont Plans into the Pittston Plan, every then-current employee of Paramont received notice on at least two occasions that they would not receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of their retirement benefits under the Pittston Plan. These notices came in the form of Robinette's 11-10-88 Letter, (Exhibit 3), and the Paramont Pride Article, (Exhibit 26). Addington and Blanton were Paramont employees in the fall of 1988. Ratliff was a Pyxis employee at that time, but he admitted that he received both Robinette's 11-10-88 Letter and the Paramont Pride Article. Meade was not an employee of any Pittston-related entity at that time. However, Meade admitted that his wife was an employee of Paramont at that time, and that it was likely that his wife received and shared Robinette's 11-10-88 Letter with him.

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A number of other accurate communications also were distributed to Paramont employees after the merger of the Paramont Plans into the Pittston Plan on January 1, 1989. Miller's 4-10-90 Letter was distributed to all Paramont employees. Miller's 4-10-90 Letter states that Paramont employees' pension benefits consisted of two parts, "your pension benefits from the Paramont Plan through December 31, 1988, and your pension benefit from the Pittston Plan from January 1, 1989." Perkins's 5-15-90 Letter also was distributed to all Paramont employees. Attached to Perkins's 5-15-90 Letter was a sample pension benefits calculation. This sample calculation used a hypothetical individual who had 14 years prior service with Paramont and eight years service under the Pittston Plan. The sample did not include the employee's time with Paramont in the calculation of benefits under the Pittston Plan, but instead used only the eight years of service under the Pittston Plan.

With the exception of the five plaintiffs, Quillen and Rennie,[2] every other witness who testified in this case stated that they understood at the time of the merger of the Paramont Plans into the Pittston Plan that Paramont employees' service from only January 1, 1989, forward would be used to calculate their retirement benefits under the Pittston Plan. These witnesses included not only upper level management with Pittston and Pittston Coal, such as Douglas, Farrell, Lennon and Spurlock,

2. Rennie's testimony did not address this issue, but was limited to her knowledge of Pittston's audit of pension benefits.

but also included management personnel with Paramont and Pyxis, such as Perkins and Dado, Pittston and Pittston Coal human resources personnel, such as Fox and Parsley, and the individuals in the local human resources departments responsible for answering Paramont employee inquiries, such as Robinette and Miller.

While there is evidence before the court that there were errors in the calculation of retirement benefits provided to Paramont employees through Pittston's Annual Benefit Statements beginning as early as 1991, this evidence also shows that of the 836 Annual Benefit Statements sent to the plaintiffs in this case, only eight percent contained an incorrect calculation of their retirement benefits. In fact, of the 132 original plaintiffs in this case, the evidence shows that only 16 received one or more incorrect Annual Benefit Statements.

Thus, the evidence presented at trial in this case varies greatly from that in *Varity,* in that it does not in any way establish any concerted corporatewide effort to purposefully deceive current and former Paramont employees with regard to what plan they were covered under for pension benefits or with regard to how their pension benefits would be calculated under the Pittston Plan after the merger of the Paramont Plans into it. Therefore, if the plaintiffs in this case are to prevail on their breach of fiduciary duty claim based on alleged misrepresentations, it must be because they have proven that specific misrepresentations were made to them individually.

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Based on the evidence introduced at trial, it also is now evident that these five plaintiffs base their breach of fiduciary duty claim on written and oral representations made by only a few individuals. These plaintiffs claim that oral misrepresentations were made to them by only three individuals — Quillen, Fox and Spindler. Based on the evidence presented at trial, I find that none of these individuals told these plaintiffs that their years of service with Paramont prior to January 1, 1989, would be included in the calculation of their benefits under the Pittston Plan.

Despite the fact that Quillen testified that he did make misrepresentations to all Paramont employees regarding their pension benefits, I specifically find that Quillen did not misrepresent that Paramont employees would receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of their benefits under the Pittston Plan. According to each of these plaintiffs other than Ratliff, Quillen stated no more to them than that their time with Paramont would count under the Pittston Plan, which was not a misrepresentation, in that their years of service with Paramont are counted for vesting purposes under the Pittston Plan. Ratliff is the only plaintiff who testified that Quillen specifically told him and others that Paramont employees would be given credit for their years with Paramont prior to January 1, 1989, in the calculation of their benefits under the Pittston Plan. Based on the evidence presented as a whole at trial, I find Ratliff's testimony on this issue not credible. I base this finding in large part on my finding that Quillen's testimony on this issue also is not credible.

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Perhaps the most difficult evidence to reconcile in this case is Quillen's testimony. A review of Quillen's testimony in this case would, at best, lead one to believe that Quillen was wilfully blind with regard to the evidence that Paramont employees would not receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of their pension benefits under the Pittston Plan. At worst, it would lead one to believe that it was Quillen, alone, who knowingly and purposefully misrepresented this fact to Paramont's employees.

Quillen insists that he believed that, beginning at the time of Pyxis's acquisition of Paramont in July 1986, Paramont's employees would immediately be covered by the Pittston Plan and that they would receive credit for all their years of service with Paramont in the calculation of their pension benefits under the Pittston Plan. Quillen further insists that he relayed this information to all the then-current Paramont employees. As noted above, it is unclear why Quillen would make these misrepresentations when the overwhelming evidence in this case shows that Quillen clearly knew that there would be no change in Paramont employees' benefits at the time of Paramont's acquisition by Pyxis.

Quillen stated that he held these beliefs based on his 1986 meeting with Farrell at Pittston's corporate office in Connecticut. Nonetheless, Quillen never actually testified that Farrell told him that Paramont's employees would be covered by the Pittston Plan upon Pyxis's acquisition of Paramont and that they would receive

credit for their years of service with Paramont in their calculation of benefits under the Pittston Plan. Farrell, on the other hand, has specifically denied that he ever made any such representation to Quillen.

Quillen's credibility on this issue also is challenged by his own words and by his failure to correct others' statements of which he had knowledge on this issue. For instance, Quillen's 7-2-86 Letter to Farrell purported to summarize his July 1, 1986, discussions with Farrell. Quillen's 7-2-86 Letter stated that his employment agreement called for him to receive credit for five years prior service upon five years service with Pittston. "[T]hus, in effect, vesting me at five years equal to ten years in the present pension plan." Quillen also admitted that he received, reviewed and signed indicating his agreement with Garges's 7-8-86 Letter that reflected that his "Benefit Accrual Service" as defined in the Pittston Plan would be increased by five years. If, as Quillen asserts, he truly believed that all Paramont employees were being brought into the Pittston Plan upon Pyxis's acquisition of Paramont, and that Paramont employees were to receive credit for their years of service with Paramont in the calculation of benefits under the Pittston Plan, then there would have been no need for Quillen to negotiate this agreement. If this agreement was intended to grant him an additional five years of service, he would have been entitled to credit for 20 years under the Pittston Plan after five years of service with Pyxis because he would have received credit for his 10 years of service from 1976 to 1986 with Paramont and he would have immediately been vested

under the Pittston Plan, which, at that time, required 10 years vesting service.

Quillen also admitted that from 1986 to January 1, 1989, he received and reviewed numerous documents which clearly stated that Paramont employees continued to be covered by only the Paramont Plans. These documents included Spindler's 2-3-87 Memo which discussed the merging of the Paramont Plans' assets with the assets of the Pittston Plan, Lennon's 8-15-88 Memo, Robinette's 8-24-88 Memo, Lennon's 9-12-88 Memo and Lennon's 9-28-88 Memo, all of which discussed the merging of the Paramont Plans into the Pittston Plan, a number of documents which, as trustee, Quillen signed amending the terms of the Paramont Plans, and the 1988 Paramont Employee Handbook, which stated that Paramont employees continued to be covered by the Paramont Plans.

Quillen admitted that he learned in the fall of 1987 that Paramont's employees were not covered by Pittston's employee benefits, including the Pittston Plan, when arrangements were being made to transfer certain Paramont employees to Pyxis. In fact, the evidence shows that Quillen, himself, requested Robinette to prepare a benefit package summary showing the changes these employees would have in their benefits when they became Pyxis employees. Quillen also admitted that he received Robinette's 9-16-87 Memo and attached benefit comparison chart, which clearly showed that Paramont employees continued to be covered by only the Paramont Plans. Robinette's 9-16-87 Memo also stated that the

transferring Paramont employees would receive credit under the Pittston Plan for their years of service with Paramont "for vesting purposes." Despite this evidence, and despite Quillen's testimony that he would have attempted to correct any misrepresentations he had known about, Quillen admitted that he never went back to any Paramont employees to inform them that they were not covered by the Pittston Plan upon Pyxis's acquisition of Paramont. Quillen also testified that, despite Robinette's 9-16-87 Memo, he believed that when these employees transferred to Pyxis, they would receive credit for their years of service with Paramont in the calculation of their pension benefits under the Pittston Plan.

Quillen also insists that he believed that, when the Paramont Plans were merged into the Pittston Plan, Paramont employees would receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of their benefits under the Pittston Plan. Nonetheless, while Quillen could not recall whether he approved the contents in advance, Quillen did admit that he received and reviewed Robinette's 11-10-88 Letter to all Paramont employees and the Paramont Pride Article, both of which were distributed prior to the merger of the plans and both of which clearly explained that Paramont employees would begin accruing pension benefits under the Pittston Plan effective January 1, 1989. Quillen also admitted that he signed the 11-18-88 Consent of Paramont Directors, to which was attached Exhibit G, the amendment that was added to the Pittston Plan to effect the merger of the Paramont Plans into the

Pittston Plan. Quillen further admitted that he sent Quillen's 4-13-97 Letter to Parsley, and he authorized the filing of a Motion for Judgment and Second Amended Motion for Judgment against Pittston in the Russell County Circuit Court, in which he makes no claim of being entitled to pension benefits under the Pittston Plan based on all his years of service with Paramont.

Based on all this evidence, I am persuaded by the testimony of four of the five plaintiffs in this case that Quillen did not tell them anything more than that their years of service with Paramont would count under the Pittston Plan. I further find that this statement was not a misrepresentation in that the Paramont employees' years of service with Paramont do count for vesting purposes under the Pittston Plan.

I also specifically find that Spindler did not tell any of these plaintiffs that Paramont employees would receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of their benefits under the Pittston Plan. Only three of the five plaintiffs currently before the court attended the January 1990 meeting at Clinch Valley College at which Spindler spoke. Both Lawson and Meade were not employees of any Pittston-related entity at the time and did not attend this meeting. Each of the three plaintiffs who did attend the meeting — Ratliff, Addington and Blanton-admit that, while Spindler represented that their years of work with Paramont would be counted under the Pittston Plan, Spindler did not say how these years would be counted and he did not specifically

address how their benefits would be calculated. Furthermore, plaintiffs offered no evidence that Spindler specifically represented that their years of service with Paramont prior to January 1, 1989, would be included in their Benefit Accrual Service for calculation of their monthly benefits under the Pittston Plan.

I further find that Fox did not tell these plaintiffs that Paramont employees would receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of their benefits under the Pittston Plan. Meade claims that Fox advised him in late 1990 or early 1991 that his time with Paramont would be included in determining his eligibility for certain employee benefits, including retirement benefits under the Pittston Plan. Again, this statement is not a misrepresentation in that Meade's years of service with Paramont are counted for vesting purposes to determine eligibility for benefits under the Pittston Plan.

Ratliff is the only plaintiff who claims that Fox told him that he would receive credit for his years of service with Paramont prior to January 1, 1989, in the calculation of his benefits under the Pittston Plan. Ratliff claims that this misrepresentation was made to him by Fox in the fall of 1987 in a meeting with 10 to 12 Paramont employees who were to be transferred to Pyxis effective January 1, 1988. Lawson also was present at this meeting, but he does not recall any representations made by Fox. In fact, he does not even recall Fox being present. Instead, Lawson claims that Quillen stated at this meeting that the Paramont employees' time with

Paramont would count for retirement benefits under the Pittston Plan, but he also admits that Quillen did not explain how this time would count. Neither Addington, Blanton nor Meade were present at this meeting. Robinette and Miller also were present at this meeting, and they each testified that Fox did not make any misrepresentation that their years of service with Paramont prior to January 1, 1989, would be included in the calculation of their benefits under the Pittston Plan. Furthermore, while Fox did not recall the specific meeting, Fox testified that she did not tell any Paramont employee that years of service with Paramont prior to January 1, 1989, would be used to calculate retirement benefits under the Pittston Plan. Based on this evidence, I do not find Ratliff's testimony on this issue credible, and I find that Fox made no such misrepresentation to Ratliff.

The plaintiffs also base their claim on certain written representations. Lawson, Meade and Ratliff each received four or more Annual Benefit Statements on which was listed an estimated monthly pension benefit which the parties stipulate was calculated based on Benefit Accrual Service that included all or part of their years of service with Paramont prior to January 1, 1989. Addington received the Administrative Committee's 1-27-95 Letter, which stated that he would receive monthly pension benefits for life in the amount $2,140.43, an amount that the parties stipulate was calculated based on Benefit Accrual Service which included all of Addington's prior service with Paramont prior to January 1, 1989. Lawson and Ratliff both received a copy

of the comparison of benefits chart prepared for those Paramont employees transferring to Pyxis effective January 1, 1988. Lawson received Miller's 12-3-90 Memo and Miller's 6-24-91 Memo. Meade received Neely's 12-21-92 Memo.

Based on my review of these documents, I find that, with the exception of the Administrative Committee's 1-27-95 Letter received by Addington, none of these documents contained any misrepresentation concerning the plaintiffs' retirement benefits. In particular, the incorrect Annual Benefit Statements received by these plaintiffs did not indicate how the estimated monthly pension benefit provided had been calculated and did not state that their years of service with Paramont prior to January 1, 1989, were included in the calculation of their benefits under the Pittston Plan. Furthermore, each of these Annual Benefit Statements contained a provision which stated:

> . . . Please remember that the figures shown are only estimates. . . . This summary does not determine the benefits you are able to receive. Only the official plan documents and the exact data applicable to you can determine your benefits. In the case of a conflict or omission, the formal plan texts will prevail.

(Exhibit 452) (Ratliff's 1988 Annual Benefit Statement).[3]

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3. At least one federal district court in the Fourth Circuit has found a breach of fiduciary duty based upon (Cont'd)

Also Miller's 12-3-90 Memo did not contain any misrepresentation with regard to Lawson's retirement benefits because it stated that Lawson's adjusted hire date would be used only for calculating vacation benefits. Furthermore, while Miller's 6-24-91 Memo and the comparison of benefits chart prepared for those Paramont employees transferring to Pyxis effective January 1, 1988, could have spelled out these employees' retirement benefits more clearly, I find that neither of these documents contained any misrepresentation that these employees would receive credit for their years of service with Paramont prior to January 1, 1989, in the calculation of the benefits under the Pittston Plan. The comparison chart simply stated that benefits would be calculated based on "yrs. service" without saying how an employee's years of service would be determined. Miller's 6-24-91 Memo stated that all hours worked by Lawson for Pittston and its subsidiaries would count toward years of service for retirement benefits. It did not say that these years of service would be used to calculate benefits under the Pittston Plan. Furthermore, Neely's 12-21-92 Memo stated only that Meade's "benefit and vesting service date" should be adjusted to October 28, 1991, as a result of Meade's agreement with Neely upon his rehire. Neely's 12-21-92 Memo did not state

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(Cont'd)

misrepresentations made to pension fund beneficiaries in annual benefit statements, and the Fourth Circuit has affirmed this ruling. *See Schaffer v. Westinghouse Savannah River Co.*, 2005 WL 567812 (4th Cir. March 11, 2005). I find that the facts of this case justify a different holding, however, based on the specific content of the Annual Benefit Statements at issue.

that this date would be used as the Benefit Accrual Service date for calculation of Meade's retirement benefits under the Pittston Plan. Also, Meade testified that he understood that Neely's 12-21-92 Memo was addressing Pittston's break in service rules, which were used for determining seniority and vacation benefits. He further testified that he and Neely had no conversations about what, if any, effect this would have on his pension benefits.

That leaves the court to address the misrepresentation made to Addington in the Administrative Committee's 1-27-95 Letter. In the fall of 1994, Addington completed paperwork to take early retirement effective January 1, 1995. Addington testified that he did not receive any pension calculation or estimate of his pension benefit at the time that he applied to take early retirement. Addington stated that, at the time he applied for early retirement, all he knew was that his monthly benefits should have been more than the maximum $350 a month under the Paramont Plans.

Addington admitted that he received some Annual Benefit Statements, but he also admitted that he never paid any attention to the information contained in these statements. The parties have stipulated that Addington's 1991, 1992, 1993 and 1994 Annual Benefit Statements listed estimated future monthly retirement benefits calculated based on years of service from January 1, 1989, although this date was not printed on the Annual Benefit Statements. None of these Annual Benefit Statements estimated Addington's total pension benefits

at more than $1,243 a month, if he continued to work until his Normal Retirement Date of November 1, 1997. Even if Addington had paid attention to these estimates, however, Addington's Annual Benefit Statement, like all of Pittston's Annual Benefit Statements, included the warning set out above which stated that the figures provided were only estimates and that actual benefits would be determined in accordance with the plan documents.

After applying to take early retirement effective January 1, 1995, and quitting work effective December 31, 2004, Addington received the Administrative Committee's 1-27-95 Letter, which informed him that the Administrative Committee had approved his application for early retirement. The Administrative Committee's 1-27-95 Letter also informed Addington that "the Administrative Committee . . . has determined that you are eligible for a lifetime monthly actuarially reduced benefit of $2,140.43." Furthermore, Addington began receiving monthly pension benefits in the amount of $2,140.43, and continued to do so for approximately five years. In 1999, Addington was notified that there had been an error in the calculation of his benefits, and his monthly pension benefits were reduced to $806.91.

The parties agree that, based on six years of Benefit Accrual Service (January 1, 1989, to December 31, 1995) and a January 1, 1995, early retirement date, Addington's total monthly pension benefits under the Pittston Plan New Formula would be $806.91. The parties also agree that, if 19 years of Benefit Accrual

Service were used to calculate Addington's benefits under the Pittston Plan New Formula, Addington's total monthly pension benefits would be $2,140.43. Therefore, it is undisputed that, based on this court's previous interpretation of the clear language of the Pittston Plan, the Administrative Committee's 1-27-95 Letter misrepresented Addington's monthly pension benefits to be $2,140.43.

There is no evidence before the court that the Administrative Committee's misrepresentation to Addington was a purposeful attempt to deceive. To the contrary, Parsley testified that he performed the pension benefit calculation for Addington in late 1994 or early 1995. Parsley further testified that he used a computer program to perform such calculations of pension benefits. Parsley stated that, after he forwarded the calculation of Addington's pension benefits to Pittston's corporate headquarters for approval, he was notified to change Addington's Benefit Accrual Service date to January 1, 1989, and to recalculate his benefits. Parsley stated that he went back and changed Addington's service date to January 1, 1989, in one field of the computer program, but he failed to change the date in another field. Parsley stated that, by failing to change the service date in both fields, Addington's benefits were again calculated based upon the years of service from his original Paramont hire date. Parsley then forwarded this calculation to Pittston's corporate headquarters, no one discovered the error and the Administrative Committee awarded Addington early pension benefits based on this calculation and sent Addington the

Appendix C

Administrative Committee's 1-27-95 Letter misrepresenting his monthly pension benefits under the Pittston Plan.

The lack of any intent to deceive, however, does not insulate the Administrative Committee from liability based on this misrepresentation. As stated above, the Fourth Circuit has recognized that, under ERISA, a fiduciary has a duty to give beneficiaries accurate information. *See Griggs*, 237 F.3d at 380; *Faircloth*, 91 F.3d at 656; *see also Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547 (6th Cir.1999) ("a fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally"). It is undisputed that the Administrative's Committee's 1-27-95 Letter did not contain accurate information concerning Addington's monthly pension benefits under the Pittston Plan. Therefore, if the court determines that the Administrative Committee was acting in a fiduciary capacity when it sent this letter to Addington, the misrepresentation contained in this letter clearly would violate an ERISA fiduciary's duty to communicate accurately with a beneficiary.

The court will now turn to the issue of whether any of the individuals or entities whom the plaintiffs claim made these misrepresentation were acting in a fiduciary capacity in doing so. As the Fourth Circuit recognized in *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 60-61 (4th Cir.1992), "[b]efore one can conclude that a fiduciary duty has been violated, it must be established

that the party charged with the breach meets the statutory definition of 'fiduciary.' "

ERISA § 3(21)(A) defines a "fiduciary" as:

> . . . a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets. . . .

29 U.S.C.A. § 1002(21)(A) (West 1999). The Fourth Circuit in *Coleman* further held that the inclusion of the phrase "to the extent" in the statutory definition means that "a party is a fiduciary only as to the activities which bring the person within the definition. . . . In other words, a court must ask whether a person is a fiduciary with respect to the particular activity at issue." *Coleman*, 969 F.2d at 61.

The court further recognized that discretionary authority or responsibility is pivotal to the statutory definition of "fiduciary." *Coleman*, 969 F.2d at 61. As the District Court for the Eastern District of Virginia has stated,

> In other words, a fiduciary within the meaning of ERISA 'must be someone acting in the capacity of manager, administrator, or financial adviser to a plan.' . . . To determine

> whether a person is subject to ERISA fiduciary duties, the court must determine the extent to which that person exercises discretionary authority, control or responsibility with respect to management or administration of the plan.

Sentara Va. Beach Gen. Hosp. v. LeBeau, 182 F.Supp.2d 518, 523 (E.D.Va.2002).

Furthermore, performing administrative acts such as answering employees' inquiries or processing claim forms does not amount to discretionary functions which *904 would qualify a person as a fiduciary under ERISA. *See Baxter v. C.A. Muer Corp.*, 941 F.2d 451 (6th Cir.1991) (a claims processor who had only the power to pay out benefits according to the terms of the established plan was not an ERISA fiduciary); *Weeks v. Western Auto Supply Co.*, 2003 WL 21510822, (W.D.Va. June 25, 2003) (performing ministerial, administrative functions such as providing written materials and answering questions are not exercising discretionary authority); *Hansen v. North Trident Reg'l Hosp., Inc.*, 60 F.Supp.2d 523 (D.S.C.1999) (handling the processing of benefit applications, claims and related paperwork were not discretionary functions); *see also Fitch v. Chase Manhattan Bank, N.A.*, 64 F.Supp.2d 212, 229 (W.D.N.Y.1999) (preparation and issuance of annual benefit statements not a fiduciary activity).

In order to determine whether a party possessed the discretionary authority or responsibility necessary to be

a fiduciary, courts first should look to the language of the plan documents themselves and, then, should look to the party's actions to determine if the party, in fact, exercised discretionary authority. *See Coleman*, 969 F.2d at 61; *see also Phelps v. C.T. Enters., Inc.*, 394 F.3d 213, 219 (4th Cir.2005) (when a party voluntarily assumes responsibility of a fiduciary, the party becomes subject to the obligations of a fiduciary under ERISA).

The defendants in this case contend that no misrepresentations occurred and, further, if they did, that they were not made by a person acting in a fiduciary capacity, and, thus, could not be the basis of a breach of fiduciary duty claim. The defendants nonetheless, concede that, during the period at issue in this case, Pittston was the plan administrator of the Pittston Plan and had delegated responsibility for administration of the Pittston Plan to the Administrative Committee. The defendants also concede that the Administrative Committee had delegated the routine day-to-day administration of the Pittston Plan to Pittston's Human Resources Department and to the Human Resources Department of the Pittston Coal Management Corporation. The defendants have further conceded that this routine administration included such functions as responding to questions by participants and calculating benefits.

Based on the evidence presented in this case, I find that the Administrative Committee was a fiduciary of the Pittston Plan and that it was acting as a fiduciary when it sent the Administrative Committee's 1-27-95

Letter to Addington. The evidence before the court shows that the Administrative Committee possessed authority for the administration of the Pittston Plan, including the ability to amend the plan, as was illustrated by its adoption of Exhibit G which merged the Paramont Plans into the Pittston Plan. The evidence also shows that it was the Administrative Committee which retained discretion to determine eligibility for benefits under the Plan and the amount of benefits payable under the Plan. (Pension-Retirement Plan of The Pittston Company And Its Subsidiaries as Amended and Restated Effective August 15, 1993, (Exhibit 502), Art. X, § 10.02(j).)

On the other hand, based on the evidence before the court, I also find that none of the individuals who the plaintiffs allege made misrepresentations possessed any discretionary authority to alter the terms of the Pittston Plan or to determine eligibility for benefits or the amount of benefits a participant was entitled to under the Pittston Plan. Those individuals would include Quillen, Fox, Spindler, Robinette, Miller and Neely. The evidence before the court shows that, at most, Fox, Robinette and Miller performed certain administrative duties for the Pittston Plan. However, none of these individuals possessed any discretionary authority to determine eligibility for benefits or the amount of benefits to which a participant was entitled. There is no evidence that Quillen, Spindler or Neely performed any functions, administrative or otherwise, with regard to the Pittston Plan.

In reaching its conclusions on this issue, the court has reviewed those cases cited by the defendants for the proposition that an employer does not breach any fiduciary duty by providing an incorrect estimate or calculation of retirement benefits. *See Denniston v. Taylor*, 2004 WL 226147 (S.D.N.Y. Feb.4, 2004) (preparation and dissemination of annual benefit statements is a ministerial nonfiduciary task); *Fitch* 64 F.Supp.2d at 229 (W.D.N.Y.1999) (preparation and issuance of annual benefit statements not a fiduciary activity because figuring employees' benefits estimates pursuant to plan was a mathematical calculation that did not require exercise of discretion); *Easa v. Florists' Transworld Delivery Ass'n*, 5 F.Supp.2d 522, 529 (E.D.Mich.1998) (employee functioned in ministerial not fiduciary capacity when she provided inaccurate estimate of retirement benefits); *Gramm v. Bell Atl. Mgmt. Pension Plan*, 983 F.Supp. 585, 593 (D.N.J.1997) (mistake in calculating pension benefit did not constitute wilful misconduct or bad faith sufficient to support breach of fiduciary duty claim); *Kuehl v. Chrysler Pension Plan*, 895 F.Supp. 1147 (E.D.Wis.1995) (mistake in calculating years of service for use in calculating estimate of retirement benefits did not support breach of fiduciary duty claim); *see also Joseph F. Cunningham Pension Plan v. Mathieu*, 1998 WL 403324, 1998 U.S.App. LEXIS 15080 (4th Cir. July 6, 1998) (unpublished) (plan administrator not liable as fiduciary for incorrect calculation of benefits). It appears that none of these cases, however, are inapposite to the court's holding that the Administrative Committee performed a fiduciary function when, through the Administrative Committee's

1-27-95 Letter, it notified Addington that it had granted his application for early retirement benefits and had determined the amount of those benefits. It appears from the court's reading of the above cases that they stand for the proposition that there is no breach of a fiduciary duty when a person, who possesses no discretion under the terms of an ERISA plan, incorrectly performs the ministerial function of calculating benefits under the terms of the plan. That is not the case here.

The court believes that its conclusions are further supported by the regulations propounded by the Department of Labor, which has enforcement oversight of ERISA matters. These regulations state in pertinent part:

> [A] person who performs purely ministerial functions such as . . . [benefit calculations] for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting the management of the plan . . . and has no authority or responsibility to do so.

29 C.F.R. § 2509.75-8 (2004). As the court pointed out in *Denniston*, 2004 WL 226147, at *10:

> Indeed, although the Department of Labor, . . . , has released administrative guidance regarding fiduciary matters indicating that benefit calculations are not a fiduciary function, it has done so in the context of a statement making it clear that such is the case only where the person doing the calculations is not in a policymaking position[.]

The evidence in this case shows that the Administrative Committee was the particular entity to which ultimate discretion had been given to determine eligibility for benefits under the Plan and the amount of benefits payable under the Plan.

That being the case, the court must now determine what, if any, relief is appropriate to remedy the Administrative Committee's breach of its fiduciary duty to Addington. Under 29 U.S.C. § 1132(a)(3), the courts may award "appropriate equitable relief" for breach of fiduciary duty under ERISA. *See Griggs*, 237 F.3d at 384. In determining what would be an "appropriate equitable" remedy under this section, it is important to note that ERISA is a comprehensive statute designed to protect the interests of employees and their beneficiaries in pension and welfare benefit plans. *See Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 989-90 (7th Cir.1993). The Supreme Court in *Varity* recognized as much when it stated, "We should expect that courts in fashioning 'appropriate' equitable relief will keep in mind the special nature and purpose of employee benefit plans.' " *Varity*, 516 U.S. at 515, 116

S.Ct. 1065 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)). Thus, while it is "appropriate" in this situation to offer a remedy to redress the injury to the individual beneficiary who received the inaccurate information, it is equally "appropriate" in crafting such a remedy to consider the interests of all the Plan's beneficiaries in ensuring that benefits are paid as provided for under the Plan.

Furthermore, the courts have held that the phrase "appropriate equitable relief" in § 502(a)(3) encompasses only "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages.)" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (*quoted in Griggs*, 237 F.3d at 384). In this case, the plaintiffs seek reformation of the Pittston Plan to include their years of service with Paramont prior to January 1, 1989, in the calculation of the benefits under the Pittston Plan. Assuming that reformation is the type of equitable relief that could be imposed under § 502(a)(3), I do not find that reformation would be "appropriate" or even "equitable" under the facts of this case.

As set forth above, I have specifically found that there were no misrepresentations made to these plaintiffs regarding the inclusion of their years of service with Paramont prior to January 1, 1989, in the calculation of their benefits under the Pittston Plan. Instead, the only misrepresentation I found made to any of these plaintiffs regarding their pension benefits was the

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Administrative Committee's 1-27-95 Letter to Addington. Although the Administrative Committee's 1-27-95 Letter incorrectly stated that Addington's monthly pension benefit under the Pittston Plan would be $2,140.43, it did not state how the Administrative Committee had arrived at this figure, and, specifically did not state that Addington's years of service with Paramont prior to January 1, 1989, were included in the calculation of his benefits. Furthermore, to order reformation of the Plan to redress the Administrative Committee's breach of fiduciary duty owed to Addington would, in essence, order the remedy sought and rejected by this court when it granted summary judgment on the plaintiffs' estoppel claim. As the district court recognized in *Benton v. Westinghouse Savannah River Co.*, Civ. No. 01:02-0055-22 (D.S.C. Sept. 24, 2002), to allow this relief in a such a case would

> run afoul of the numerous cases precluding relief under an equitable estoppel theory. *See generally Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54 (4th Cir.1992) (rejecting reliance on estoppel principles to modify the terms of a written employee benefit plan); *907 *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir.1992) ("[R]esort to federal common law generally is inappropriate when its application would . . . threaten to override the explicit terms of an established ERISA benefit plan.").

> Further, because it would work an end run around the clear body of law enforcing the terms of plans as written, . . . [it also] would run afoul of the guidance given by the Supreme Court in *Varity* as to what equitable relief might be appropriate. *See Varity,* 516 U.S. at 514-15, 116 S.Ct. 1065 (stating the belief "that courts, in fashioning 'appropriate' equitable relief, will keep in mind the 'special nature and purpose of employee benefit plans,' and will respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others' ").

Therefore, I find that the more appropriate and equitable remedy in this situation would be to restore Addington, as much as possible, to the position he would have been in had this misrepresentation never been made. Addington testified that, had he known that his monthly pension benefits under the Pittston Plan were only $806.91, he would not have taken early retirement effective January 1, 1995. The defendants argue that no equitable relief is appropriate in this case because Addington could not have relied on the information contained in the Administrative Committee's 1-27-95 Letter because it was received after he took early retirement. The facts before the court, however, show that, while Addington quit working effective December 31, 1994, and applied for early retirement benefits, those benefits were not approved until the Administrative Committee's 1-27-95 Letter. In fact the Letter states, "The Administrative Committee has approved your application for early retirement benefits. . . ."

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The Fourth Circuit in *Griggs*, 237 F.3d at 385, recognized reinstatement of employment would be an appropriate equitable remedy when an employee had been induced to accept early retirement based on incomplete or inaccurate information for which the plan administrator could be held responsible. "We believe that reinstatement, as a general equitable concept, is within the range of redress permitted by the phrase other appropriate equitable relief." *Griggs*, 237 F.3d at 385. On subsequent appeal, the Fourth Circuit also recognized that rescission was an appropriate equitable remedy under § 502(a)(3). *Griggs v. E.I. Dupont de Nemours & Co.*, 385 F.3d 440, 441-42(4th Cir.2004) (*"Griggs II"*). Thus, it appears that, if the court should find it appropriate to do so, the court in this case could order rescission of Addington's election to take early retirement and reinstatement to his previous position.

In this case, Addington took early retirement effective January 1, 1995. Thus, Addington has been out of the work force for more than 10 years. Also, Addington, who was 62 years old at the time that he took early retirement, is currently 72 years old. Furthermore, the evidence before the court is that Pittston, subsequent to Addington's early retirement, sold all of its coal mining operations and is no longer in the business of mining coal. Therefore, based on these facts I find that rescission of Addington's election to take early retirement and reinstatement to his former position is neither appropriate or even possible.

That does not, however, necessarily mean that rescission of Addington's election to take early retirement is inappropriate. Addington testified that, if he had been given accurate information concerning the amount of his monthly pension benefits, he would not have taken early retirement. That being the case, it appears fair to assume in crafting an equitable remedy that Addington would have continued to work until at least his normal retirement date of November 1, 1997. The parties have stipulated that, based on Addington's 1995 Average Salary and Covered Compensation Base and 8.333 years of Benefit Accrual Service (from January, 1, 1989, to November 1, 1997), his combined monthly retirement benefits under the Pittston Plan would be $1,256.00. Therefore, it appears appropriate and equitable for the court to order that Addington be allowed to rescind his election for early retirement benefits and to reinstate him to the benefits he would be entitled to under the Pittston Plan if he had continued to work until his normal retirement date of November 1, 1997, which, based on the evidence before the court, would be $1,256.00.

In so holding, the court is cognizant of the fact that equitable rescission usually involves a restoration of the parties to the status quo as it existed before the rescinded transaction. *See Pinter v. Dahl*, 486 U.S. 622, 642 n. 18, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988) (noting that equitable rescission provides for restoration of the status quo). However, as the Fourth Circuit recognized in *Griggs II*, "the complete-restoration requirement is a general one that is subject to certain exceptions."

Griggs II, 385 F.3d at 447-48. Instead, the court in *Griggs II* stated that courts of equity may order rescission "where the equities of the situation so demanded." *Griggs II*, 385 F.3d at 448-49. The court in *Griggs II* continued:

> Although this formulation of the exception is somewhat broad, we believe that it gives federal courts the flexibility necessary to appropriately balance the interests of participants and beneficiaries of ERISA plans against the interests and obligations of ERISA employers and fiduciaries.... A rule generally requiring full restoration of benefits to accompany a grant of rescission protects the financial integrity of ERISA plans, while permitting an exception to this rule when the equities of the situation demand provides a necessary incentive for ERISA fiduciaries to take seriously their obligations to protect the interests of the participants and beneficiaries.

Griggs II, 385 F.3d at 449.

When applying this rule, and its exception, to the facts of this case, I find that it would be both unreasonable and inequitable to order Addington to return any of the early retirement benefits he received in order to rescind his early retirement election. The Pittston Plan has not sought any reimbursement from Addington for the overpayment of benefits it made to him. Addington had no role in the miscalculation of the

amount of his early retirement benefits. To the contrary, the entire blame for the miscalculations of Addington's early retirement benefits lies with the Pittston Plan and with the Pittston employees who were entrusted with the task. While I have found that the evidence in this case failed to prove any purposeful scheme to deceive, I, nonetheless, note that the evidence is replete with examples of careless inattention to detail in the administration of this ERISA plan, which resulted in numerous errors including the inaccurate calculation of benefits provided to Addington which is the basis of this claim. Thus, I find that the equities of the situation demand an exception to the full restoration rule in order to provide a necessary incentive for these ERISA fiduciaries to take seriously their obligations to protect the interests of the participants and beneficiaries in the future.

The defendants also have alleged that the plaintiffs' breach of fiduciary claim is barred by ERISA's statute of limitations. *See* 29 U.S.C. § 1113 (West 1999). Section 1113 provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case

> of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (West 1999).

The only breach of fiduciary duty found in this case was the misrepresentation contained in the Administrative Committee's 1-27-95 Letter to Addington. The evidence before the court shows that Addington did not know that this letter contained any misrepresentation until some time in the fall of 1999, when Spurlock called him to inform him that his monthly retirement benefits had been miscalculated and soon would be reduced to the correct amount. In fact, the evidence shows that the Pittston Plan continued to pay Addington the monthly benefits awarded in the Administrative Committee's 1-27-95 Letter through December 1999. The plaintiffs filed this case in the Eastern District of Tennessee on December 19, 2001. Thus, Addington's claim was filed more than six years after the misrepresentation was made to him, but less than three years after he learned of the misrepresentation.

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Section 1113 provides a statute of limitations of the earlier of six years from the date of the last action constituting a breach or three years from the date on which the plaintiff had knowledge of the breach. Section 1113 also provides, however, that in cases of "fraud or concealment," a breach of fiduciary duty claim may be commenced within six years of discovery of the breach. At least one circuit court has held this six-year statute of limitations is not limited to only those cases of fraudulent concealment, but rather applies to breach of fiduciary duty claims based on misrepresentations where the defendant engaged in acts which hindered the plaintiff's discovery of the breach. *See Caputo v. Pfizer, Inc.*, 267 F.3d 181, 188-90 (2nd Cir.2001). In this case, the Administrative Committee's misrepresentation of Addington's monthly retirement benefits was concealed by the fact that the Pittston Plan continued to pay Addington at the rate awarded in the Administrative Committee's 1-27-95 Letter through November 1999. Thus, the Administrative Committee's misrepresentation which is the basis of its breach of fiduciary duties was, in essence, concealed from Addington until he received notice from Spurlock in the fall of 1999 that the Administrative Committee's representations were wrong. Thus, I find that the six-year period of limitation in cases of concealment under § 1113 should be applied in this case and that Addington filed his breach of fiduciary duty claim within six years of his discovery of the breach.

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III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The only misrepresentation made to any of these five plaintiffs concerning their retirement benefits under the Pittston Plan was the Administrative Committee's 1-27-95 Letter to Addington, which inaccurately informed him that his monthly early retirement benefits under the Pittston Plan would be $2,140;

2. The Administrative Committee was acting as a fiduciary under the Pittston Plan when it sent its 1-27-95 Letter to Addington;

3. The misrepresentations regarding the amount of Addington's monthly pension benefits contained in the Administrative Committee's 1-27-95 Letter breached the Administrative Committee's fiduciary duties owed to Addington as a beneficiary of the Pittston Plan under ERISA;

4. The appropriate and equitable remedy in this case is to order that the Pittston Plan rescind Addington's election to take early retirement effective January 1, 1995, and reinstate him to his full retirement benefits of $1,246 a month effective his normal retirement date of November 1, 1997, and continuing;

5. The six-year period of limitation in cases of concealment under 29 U.S.C. § 1113 should be

applied to Addington's breach of fiduciary duty claim; and

6. Addington's breach of fiduciary duty claim is not barred by the statute of limitations because he filed his claim within six years of his discovery of the breach.

IV. CONCLUSION

Based on the above, the court finds that the Administrative Committee of the Pittston Plan breached its fiduciary duty to Addington when it inaccurately informed him that his monthly early retirement benefits would be $2,140.43 per month. The court further finds that the appropriate and equitable remedy of that breach is to order that the Pittston Plan rescind Addington's election to take early retirement effective January 1, 1995, and reinstate him to his full retirement benefits of $1,246 a month effective his normal retirement date of November 1, 1997, and continuing.

An appropriate order will be entered.

ENTER: June 3, 2005.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE

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(2)

No. 07-1285

FILED
MAY 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JIMMY ADAMS, *et al.*,

Petitioners,

v.

THE BRINK'S COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent The Brink's Company states that it has no parent company and that no publicly held company owns 10% or more of its stock.

Paramont Coal Corporation is a wholly owned subsidiary of The Brink's Company. No other publicly traded company owns 10% or more of Paramont Coal Corporation's stock.

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INTRODUCTION

In this action, Petitioners[1] seek additional pension benefits beyond those provided by the unambiguous terms of the Brink's Company Pension-Retirement Plan (formerly known as The Pension-Retirement Plan for The Pittston Company and Its Employees, and described throughout this brief in opposition as the "Pittston Plan" or the "Plan") pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

One hundred twenty-five former employees of Paramont Coal Corporation ("Paramont") seek benefit accrual service credit under the Pittston Plan for service with Paramont before Paramont's less generous pension plan was merged into the Pittston Plan. They seek this credit even though they retain all benefits they have earned under the Paramont plan for the same years of Paramont service — essentially they want to "double dip" for those years. Pittston denied Plaintiffs the windfall they sought. The district court and the Fourth Circuit agreed that the Pittston Plan is unambiguous and does not allow for such double benefits for the same years of service.

Plaintiffs' Petition For A Writ Of Certiorari ("Petition") does not challenge this holding that the Plan

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[1] This brief refers to (a) Petitioners as "Plaintiffs," "Initial Plaintiffs," or "Remaining Plaintiffs," as appropriate based on whether their claims were tried ("Initial Plaintiffs") or decided on summary judgment ("Remaining Plaintiffs"), and (b) all Defendants/Respondents as "Pittston."

is clear. The Petition does not contend that any Plaintiff has been or will be denied benefits owed by the Pittston Plan. Instead, Plaintiffs claim Pittston told them that they would receive double pension credits and they should therefore receive such benefits despite the clear terms of the Plan. But the district court found after trial on five Plaintiffs' claims that Pittston made no relevant misrepresentations to those Plaintiffs.[2] The district court further found that only five of the 119 Remaining Plaintiffs created a dispute of fact about the existence of any misrepresentation in response to Pittston's summary judgment motion. As to those five Remaining Plaintiffs, the trial court dismissed only four of their claims based on the lack of a disputed fact as to whether the alleged speaker was acting as a fiduciary. And even for those four, the district court decided that their claims were barred by the applicable statute of limitations. *Adams v. Brink's Co.*, 372 F. Supp. 2d 854, 901 (W.D. Va. 2005); *Adams v. Brink's Co.*, 420 F. Supp. 2d 523, 553-556 (W.D. Va. 2006).

The Petition disregards findings and conclusions of the trial court and the holdings of the Fourth Circuit. The judgment below reflects no error with respect to the questions presented by the Petition. More importantly, the questions presented by the Petition are not necessary to the result below and, therefore, should not be heard by this Court.

---

[2] The district court found a misrepresentation to Plaintiff Christopher Addington in an early retirement letter, but that misrepresentation is not the subject of the Petition.

STATEMENT OF THE CASE

The Petition's abbreviated recitation of the proceedings below does not allow adequate consideration of the Petition. Pittston therefore supplements Petitioners' Statement of the Case as follows.

In July 1986, Pyxis Resources, a Pittston subsidiary, acquired Paramont Coal Company ("Paramont"). (Pet. App., 7a). At the time, Plaintiffs were employees of Paramont and covered by one of two identical defined benefit pension plans providing a maximum $350 monthly benefit at retirement. Pittston had a pension plan for its employees that potentially paid much higher benefits. After the acquisition, Plaintiffs remained members of the Paramont pension plans until January 1, 1989 when the Paramont Plans were merged into the Pittston Plan. Upon the plans' merger, Plaintiffs' benefits accrued under the Paramont plans were frozen as of December 31, 1988 and retained by Plaintiffs. This case turns on whether Plaintiffs are entitled to receive benefits under the more lucrative Pittston Plan formula based on their years of service (i) beginning when they became members of the Pittston Plan, or (ii) including their pre-plan-merger years of service for which they will also receive benefits under the Paramont plans.

On November 18, 2003, the district court granted summary judgment to Pittston on all claims except for Plaintiffs' claims for breach of fiduciary duty. The district court held that the Pittston Plan did not entitle

Plaintiffs to the higher benefits they sought because the Plan clearly states that benefit accrual service for Paramont employees' service before January 1, 1989 would be determined solely under the terms of the Paramont plans. Plaintiffs later moved for reconsideration of this holding. On January 18, 2005, the district court denied Plaintiffs' motion and again held the Plan was unambiguous. The Fourth Circuit affirmed the district court's ruling that the Plan language is clear and unambiguous and does not provide Plaintiffs the benefits they allege. (Pet. App., 24-25a).

After full trial of five Initial Plaintiffs' claims, the district court found that the only misrepresentation made to any of them was a January 27, 1995 letter to Christopher Addington that overstated the amount he would be paid in early retirement. That sole misrepresentation to Addington is not a subject of the Petition. (Pet. Cert. i n.1). The court granted judgment in Pittston's favor on the claims of the four other Initial Plaintiffs. *Adams*, 372 F. Supp. 2d at 899-901. Among her findings after trial, the district judge found that (a) Spindler made no misrepresentation at the Clinch Valley College meeting that the Petition discusses extensively (*id.* at 899-900; Pet. Cert. at 12-13); (b) Quillen, whose alleged statements the Petition discusses extensively (Pet. Cert. at 13), was not a credible witness and made no misrepresentation, (*Adams*, 372 F. Supp. 2d at 897); and (c) there was no evidence that Pittston acted with any intent to deceive. *Id.* The district court also found as an alternative basis for denying Initial Plaintiffs' claims that none of the alleged speakers were acting in a fiduciary capacity except Joseph Farrell (who, like the others, made no misrepresentation). *Id.* at 904.

On March 17, 2006, the court granted Pittston summary judgment on all 119 Remaining Plaintiffs' fiduciary duty claims because no genuine issue of material fact existed as to whether Pittston breached a fiduciary duty. Of the 119 Remaining Plaintiffs, the district court found that only five (Adkins, Hess, Shelton, Sluss, and White) provided any evidence of misrepresentation sufficient to create a dispute of fact. *Adams*, 420 F. Supp. 2d at 549. Of those five, only one (Sluss) presented evidence of a misrepresentation by an individual (Joseph Farrell) who could be found to have acted in a fiduciary capacity because he "possessed any discretionary authority to alter the terms of the Pittston Plan or to determine eligibility for benefits or the amount of benefits a participant was entitled to under the Pittston Plan." *Adams*, 420 F. Supp. 2d 552. The district court found that Sluss's claim was time barred. *Id.* at 554.

Thus, the district court based its summary judgment dismissal of only four Plaintiffs' claims (Adkins, Hess, Shelton and White) on a ruling that the alleged speakers were not fiduciaries. Adkins claimed to have heard misrepresentations from Spindler; White from Quillen and Rasnick; Hess from Ratliff; and Shelton from Ratliff and Miller. *Id.* at 550. Importantly, however, for even these four Plaintiffs, the district court provided an alternative basis for dismissal of their claims. The district court found that none of the Remaining Plaintiffs produced any evidence that any alleged misrepresentation occurred on or after December 19, 1995. *Id.* at 553. As a result, all of these claims were barred at a minimum by ERISA's six-year limitations period. *Id.* at 554-55.

REASONS FOR DENYING THE PETITION

This Court will grant certiorari only for compelling reasons. Sup. Ct. R. 10. There is no compelling reason for this Court to grant certiorari in this matter because the issue of when an employee acts as an ERISA fiduciary is simply not a necessary basis for the decision below. Additionally, the decision by the Fourth Circuit does not conflict with any decision made by this Court or the decisions of other United States Courts of Appeal.

I. THE ISSUE OF WHETHER THE SPEAKERS CITED BY PLAINTIFFS WERE ACTING AS FIDUCIARIES IS UNNECESSARY TO ALL BUT FIVE PLAINTIFFS WHOSE CLAIMS ARE TIME-BARRED.

Petitioners ask this Court to clarify what actions make an employee of an entity a fiduciary and whether the doctrines of respondeat superior and/or apparent authority apply in making this determination. As discussed above in the Statement of the Case, these issues were not necessary to the dismissal of any Plaintiff's claim.

Simply put, after trial and on summary judgment, the district court dismissed all but five Plaintiffs' claims (excluding the small portion of Addington's claim) because no one made any misrepresentation to those Plaintiffs. Each of the five remaining Plaintiffs' claims was time barred. Thus, while the district court did in fact decide the issue of when an employee acts in a fiduciary capacity under ERISA, the district court

decided other issues in a way to render the fiduciary duty question raised by Petitioners unnecessary to the final result.

The Fourth Circuit did not address the limitations period, finding it moot in view of that court's other bases for decision. *Adams v. Brink's Co.*, Nos. 06-1744, 06-1770, 2008 WL 142771, at *7 (4th Cir. Jan. 11, 2008) (Pet. App. 23a). Although Petitioners offer to address the limitations issue upon remand (Pet. Cert. 4-5 n.4), they do not argue that the district court wrongly decided the issue. Nor can they. ERISA bars all claims for breach of fiduciary duty six years after the claim first accrues. 29 U.S.C. § 1113 (2000); *Adams*, Nos. 06-1774, 06-1770, 2008 WL 142771, at *11 n.4 (Pet. App. 23a n.4). ERISA also bars fiduciary duty claims three years after participants have actual knowledge of their claims. 29 U.S.C. § 1113 (2000). The district court found that ERISA's three-year and six-year statutes of limitations bar all claims that are the subject of Plaintiffs' petition because (1) Plaintiffs' claims accrued before December 19, 1995, six years before filing this action (*Adams*, 420 F. Supp. 2d at 553-56); (2) Plaintiffs had actual knowledge of their claims more than three years before filing this action, having received the accurate written communications sent to all Paramont employees (*id.*); and (3) Plaintiffs submitted no evidence of fraud or acts of concealment that would trigger the six-year-from-discovery limitations period. *Id.* at 554-55.

In sum, this Court need not, and therefore should not, decide the questions presented by Petitioners.

II. EVEN IF THE QUESTIONS PRESENTED WERE NECESSARY TO THE JUDGMENT IN THIS CASE, *VARITY* DOES NOT REQUIRE A DIFFERENT RESULT BECAUSE NONE OF THE SPEAKERS ATTEMPTED TO OR DID INDUCE CHOICES THAT DEPRIVED PLAINTIFFS OF PLAN BENEFITS.

Petitioners challenge the judgment below as "inimical to" *Varity Corp. v. Howe*, 516 U.S. 489 (1996). (Pet. Cert. 20). This argument relies on an unprincipled and overly expansive reading of *Varity*. Unlike in *Varity*, no Plaintiff here was deprived of Plan benefits and no speaker attempted to affect any Plaintiff's choice under the Plan choices. It is undisputed here that no Plaintiff faced any choice and no Plaintiff will receive less benefits than the clear language of the Plan provides.

Varity held that "a 'person is a fiduciary with respect to a plan,' and therefore subject to ERISA fiduciary duties, 'to the extent' that he or she 'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan." *Varity Corp.*, 516 U.S. at 498 (quoting ERISA § 3(21)(A)). In *Varity*, this Court held that an employer/plan administrator acted in its fiduciary capacity when it met with employees specifically to explain plan benefits and encourage the employees voluntarily to forfeit their benefits in favor of an allegedly comparable plan. The message conveyed to employees at this meeting both orally and through four separate written communications distributed at the

meeting was that transferring to the new company would not significantly undermine the security of the employee's benefits. This Court held that "given this view of the facts," the district court decided "that Varity spoke, in significant part, in its capacity as plan administrator, rather than employer." *Varity Corp.*, 516 U.S. at 501-02.

In the present case, the district court found that the Pittston Plan administrators clearly and accurately communicated the Plan benefits to the Paramont employees in writing. *Adams*, 420 F. Supp. 2d at 555. Equally important, Plaintiffs will receive all of their Plan benefits. Plaintiffs do not even contend that any of the alleged statements of the speakers deprived Plaintiffs of any benefits to which the district court held they were entitled under the terms of the Plan. Against this factual backdrop, no case cited by Plaintiffs would support a finding that the speakers acted as fiduciaries and breached their fiduciary duties.

Even if the speakers had incorrectly explained the employees' benefits, Plaintiffs were never given any choice about their pension benefits and thus the communications did not constitute fiduciary acts under *Varity*. After the Paramont plan was merged into the Pittston Plan, Paramont employees did not have to do anything differently to begin accruing the more generous Pittston Plan benefits. Of the five Plaintiffs who created a factual dispute that they heard a misrepresentation that they would receive benefit accrual service credit for their pre-plan-merger years of service with Paramont, none presented any evidence that he or she made any choice or took any action in

reliance on the alleged misrepresentation. The Petition does not claim otherwise.

The Fourth Circuit correctly affirmed the district court's decision and highlighted this case's factual distinction from *Varity*. The court found it "significant that the Pittston Plan administrators clearly and accurately communicated the plan benefits to the Paramont employees in writing." *Adams*, 2008 WL 1422771, at *7 (Pet. App., 19a). The court also noted that none of the alleged misrepresentations deprived Plaintiffs of any benefits to which they are entitled under the Plan, and that all Plaintiffs will receive their contractually defined benefits under the Plan. *Id.*

The judgment below simply does not conflict with *Varity*.

III. THIS CASE DOES NOT PRESENT AN ISSUE ON WHICH A CONFLICT EXISTS AMONG THE CIRCUITS.

For the reasons discussed above, this case does not present an issue on which the circuit courts conflict. While there may be unresolved issues and even differences among the circuits regarding when an employee acts as a fiduciary under ERISA's functional test, those differences are not implicated in this case because the alleged communicators were simply not communicating inaccurately in a situation affecting employees' choices with respect to their benefits. None of the cases cited by Petitioners holds to the contrary.

For example, in *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000), the summary plan description and the oral communications made to a returning pregnant employee failed to inform her that she needed to pay for one month of COBRA to obtain insurance coverage for her pregnancy. The Seventh Circuit did not hold that the ministerial employees acted as fiduciaries when they spoke about plan benefits. Specifically, the court stated, "if the written materials [are] inadequate, then the fiduciaries themselves must be held responsible for the failure to provide complete and correct material information in the event that a nonfiduciary agent provides misleading information." *Id.* at 591. Thus, the court acknowledged that the ministerial employees were not fiduciaries, but that the overall act of informing the plan participants about the procedures to obtain their plan benefits was a fiduciary act. *Id.* at 590-91. The Fourth Circuit agreed that ministerial acts are not fiduciary acts. *Adams*, 2008 WL 142771, at *6 (Pet. App., 19a). Equally important, Pittston's written communications to plan participants accurately described how they would accrue benefit service credit. *Id.* at *8 (Pet. App., 23-25a).

In *Krohn v. Huron Mem. Hosp.*, 173 F.3d 542 (6th Cir. 1999), the Sixth Circuit did not even analyze whether the acting person was acting in a fiduciary capacity. Instead, the court assumed fiduciary status and analyzed whether a fiduciary duty was breached when the plan denied long-term disability benefits to a participant who would have otherwise received the benefit had the employer followed proper procedures and given the plan participant proper information. *Id.* at 549-50. The Sixth Circuit said nothing contrary in

McGrath v. Lockheed Martin Corp., Nos. 00-6601, 00-6602, 2002 WL 31269646 (6th Cir. Oct. 9, 2002). The speaker in *McGrath* acted according to the employer/plan administrator's policy of informing employees that they had to be on active payroll status to receive the benefit of any future decision regarding benefit service when the employees did not, in fact, have to be on active payroll status. *Id.* at **11-12. The speaker sent a letter to the plaintiff misstating the company's policy in lieu of sending the plan document. *Id.* Unlike Pittston, in *McGrath*, the defendants had not distributed numerous correct explanations. Moreover, Petitioners concede that the Sixth Circuit's opinion in *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002), involved a material misrepresentation misleading an employee in making an informed benefit choice. (Pet. Cert. 16).

The same was true in *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997), in which, again, the Second Circuit did not analyze whether the acts at issue were fiduciary acts. Starting from the premise that the plan administrator spoke as a fiduciary, the Second Circuit held that a fiduciary duty was breached if the plan administrator made misrepresentations that induced the plaintiffs to retire early and thereby lose the increased benefits they would have received under plan amendments then under consideration. *Id.* at 123-24.

Similarly, in *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982 (3d Cir. 1995), there was no dispute about whether a fiduciary act had occurred; the dispute involved the scope of the resulting fiduciary duty. The

Third Circuit held that if an employee retired early in reliance upon a plan administrator's misrepresentations, thereby losing benefits to which he would have been entitled under plan amendments about to be implemented, then the plan fiduciary could be held liable. *Id.* at 989. The Ninth Circuit in *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), also addressed a situation in which an employer failed to give an inquiring employee considering an early retirement package accurate information about a possible imminent change in the benefit plan.

Each of these cases presented demonstrably different situations than addressed by the Fourth Circuit below. This case does not, therefore, present an issue on which the circuit courts conflict.

CONCLUSION

This judgment below was correct. Upholding it does not require addressing the questions presented by Petitioners or resolving any conflict among the circuit courts with respect to ERISA. The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

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